

# The Unitary Executive in the Modern Era, 1945–2004

Christopher S. Yoo\*, Steven G. Calabresi\*\* & Anthony J. Colangelo\*\*\*

*ABSTRACT: Since the impeachment of President Clinton, there has been renewed debate over whether Congress can create institutions such as special counsels and independent agencies that restrict the president's control over the administration of the law. Initially, debate centered on whether the Constitution rejected the "executive by committee" used by the Articles of Confederation in favor of a "unitary executive," in which all administrative authority is centralized in the president. More recently, the debate has focused on historical practices. Some scholars suggest that independent agencies and special counsels are such established features of the constitutional landscape that any argument in favor of a unitary executive is foreclosed by established practice. Others, led by Bruce Ackerman, claim that the New Deal represented a "constitutional moment" that ratified big changes in the distribution of power within the federal government. Still others argue that the added policymaking role of the modern administrative state means Congress ought to be able to impose greater limits on presidential control over the execution of the law. To date, however, a full assessment of the historical record has yet to appear.*

*This Article is part of a larger project offering a comprehensive chronicle of the battles between the president and Congress over control of the administration of federal law. It reviews the period between 1945 and 2004, paying particular attention to the Clinton impeachment and the lapse of the independent-counsel statute. The record shows that presidents from Harry S. Truman through George W. Bush consistently defended the unitariness of the executive branch, vitiating any claim that a custom of allowing congressional incursions on the unitary executive has emerged. In fact, the episodes discussed herein eloquently illustrate both the legal and the normative arguments supporting the unitary executive.*

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\* Associate Professor of Law, Vanderbilt University.

\*\* Professor of Law, Northwestern University.

\*\*\* Associate, Cleary Gottlieb Steen & Hamilton, LLP.

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## INTRODUCTION

Recent years have seen renewed interest in the separation of powers. Supreme Court decisions striking down the legislative veto,<sup>1</sup> the line-item veto,<sup>2</sup> and congressional attempts to control federal spending through the Gramm-Rudman-Hollings Act<sup>3</sup> led to much academic commentary on the proper roles of Congress and the president in controlling the execution of federal law.<sup>4</sup> Much of this scholarship has focused on the constitutionality of the so-called independent agencies, such as the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC), which theoretically operate outside of direct presidential control.<sup>5</sup> But the most dramatic flash point for debates about Congress's ability to limit presidential authority over the execution of the law has been the use of independent counsels.<sup>6</sup> The Supreme Court upheld the constitutionality of the independent-counsel statute in *Morrison v. Olson*,<sup>7</sup> notwithstanding Justice Scalia's warning that special prosecutors could be manipulated for political purposes.<sup>8</sup> The years that followed bore out Justice Scalia's predictions,<sup>9</sup> with

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1. *INS v. Chadha*, 462 U.S. 919 (1983).

2. *Clinton v. City of New York*, 524 U.S. 417 (1998).

3. *Bowsher v. Synar*, 478 U.S. 714 (1986).

4. Professor Calabresi has been a leading participant in these debates. See Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

5. See e.g., David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 31-36; Symposium, *The Independence of Independent Agencies*, 1988 DUKE L.J. 215; Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 608-23 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987); Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779.

6. For early commentary on the constitutionality of independent counsels, see generally TERRY EASTLAND, *ETHICS, POLITICS AND THE INDEPENDENT COUNSEL* (1989); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Shane, *supra* note 5, at 598-608; Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59 (1983).

7. 487 U.S. 654 (1988).

8. *Id.* at 712-14, 727-30 (Scalia, J., dissenting).

9. See Archibald Cox & Philip B. Heymann, *After the Counsel Law*, N.Y. TIMES, Mar. 10, 1999, at A19; Benjamin Ginsberg & Martin Shefter, *Ethics Probes as Political Weapons*, 11 J.L. & POL. 497 (1995). For an analysis of the separation-of-powers impact of the political abuse of independent counsels, see Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 90-95 (1995) [hereinafter Calabresi, *Some Normative Arguments*]; Steven G. Calabresi, *Some Structural Consequences of the Increased Use of Ethics Probes as Political Weapons*, 11 J.L. & POL. 521 (1995).

the eventual initiation of politically controversial impeachment proceedings against President Clinton. In the wake of the Clinton impeachment, the statute authorizing independent counsels was allowed to lapse in 1999 because it had completely lost the support of both major parties in Congress.

Scholarly debate has focused on whether the Constitution created a "unitary executive" in which all executive authority is centralized in the president, rather than the "executive by committee" that existed under the Articles of Confederation. Participants in the debate have examined the Constitution's text<sup>10</sup> and ratification history<sup>11</sup> to determine whether it rejected the plural executive used by the Articles of the Confederation and many state constitutions in favor of a structure in which all administrative authority was concentrated in a single person.<sup>12</sup> To the extent that commentators have focused on the post-ratification history with respect to this issue, they have concentrated on the practices during the presidential administrations immediately following the Founding.<sup>13</sup> Moreover, some of the historical treatments to date suggest that arguments in favor of the unitary executive have been foreclosed by the sweep of more than two centuries of consistent contrary practice.<sup>14</sup> Others have offered the more

10. Compare, e.g., Calabresi, *supra* note 4 (arguing that the Article II Vesting Clause, bolstered by other constitutional provisions, represents a substantive grant of constitutional power), Calabresi & Prakash, *supra* note 4 (same), and Calabresi & Rhodes, *supra* note 4 (same), with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47-55, 119 (1994) (disagreeing with Professor Calabresi's views), and A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994) (same).

11. Compare, e.g., Calabresi & Prakash, *supra* note 4, at 603-05 (arguing that the preratification history supports the unitary executive), and Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 753-89, 808-12 (same), with Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755-810 (1996) (drawing the opposite conclusion), and Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 138-53 (1994) (same).

12. The position that the Constitution of 1787 established a unitary executive has found general acceptance among courts, see *Myers v. United States*, 272 U.S. 52, 110-33 (1926); *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981); among historians, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 250-53, 257-58 (1996); and even among leading critics of the unitary executive, see Strauss, *supra* note 5, at 599-601; Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432-33 (1987).

13. See Calabresi & Prakash, *supra* note 4, at 635-63; Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); Gerhard Casper, *Executive-Congressional Separation of Power During the Presidency of Thomas Jefferson*, 47 STAN. L. REV. 473 (1995); Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79, 82-111 (1993); Lessig & Sunstein, *supra* note 10, at 5-84; Prakash, *supra* note 11, at 789-800.

14. See FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 180 n.35 (1994). ("[M]ore than 200 years of practice under the Constitution . . . render a strict separation [of powers] impossible."); Flaherty, *supra* note 11, at 1816 (suggesting that a common law constitutionalist would regard the past 200 years of practice under the Constitution "dispositive" in foreclosing the unitary vision of the executive); Tiefer, *supra* note

limited historical claim that non-unitariness has only been an established practice since the New Deal. Some of those offering such arguments have candidly acknowledged the incompleteness of the current literature and have recognized the need for a more thorough assessment of the historical record of presidential control over the execution of the law.<sup>15</sup>

We have tried to fill this void by embarking on a four-article series examining the history of the president's ability to execute the law. In *The Unitary Executive During the First Half-Century*,<sup>16</sup> we analyzed the first seven presidencies under the Constitution to determine the view of presidential power held by the incumbents between 1789 and 1837. In so doing, we paid particular attention to what is generally recognized as the first great clash between the president and Congress over control of the administration of the law: Andrew Jackson's removal of his Treasury Secretary during his battle with the Bank of the United States.<sup>17</sup> Writing in 1997, when the institution of independent counsels still enjoyed broad support among both politicians and academic commentators,<sup>18</sup> we called for and predicted the demise of the independent counsel statute.<sup>19</sup>

We continued our project in *The Unitary Executive During the Second Half-Century*,<sup>20</sup> beginning with Martin Van Buren's presidency in 1837 up through the end of the first Administration of Grover Cleveland in 1889. In the process, we offered an extended discussion of the second great conflict over the unitary executive: the impeachment of Andrew Johnson for violating the Tenure of Office Act.<sup>21</sup> The period closed with a series of landmark events, including the enactment of the Civil Service Act of 1883, the creation of the Interstate Commerce Commission (ICC) in 1887 (the agency that would

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6, at 103 ("From the creation of the government's structure by the First Congress, through the development of the modern agency, and down to the present, the status of agencies has not been a unitary or monolithic one."); see also Miller, *supra* note 5, at 83-86 (finding past presidents' failure to consistently oppose independent agencies problematic, but ultimately insufficient to constitute acquiescence).

15. See Lessig & Sunstein, *supra* note 10, at 84 n.334 (noting that "a full account of the growth of presidential power" would allow consideration of "the enormously significant and self-conscious changes in the role of the presidency from the period following Jackson through Franklin Roosevelt").

16. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997).

17. *Id.* at 1538-59.

18. See Ken Gormley, *Monica Lewinsky, Impeachment, and the Death of the Independent Counsel Law: What Congress Can Salvage from the Wreckage—A Minimalist View*, 60 MD. L. REV. 97, 101-02 (2001) (noting that as of the end of 1997 the independent-counsel statute still enjoyed broad support and that the abruptness with which people abandoned it came as a shock).

19. Calabresi & Yoo, *supra* note 16, at 1462.

20. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 668 (2003).

21. *Id.* at 746-58.

eventually become the model for all subsequent independent agencies), and the repeal of the Tenure of Office Act in 1887.<sup>22</sup>

In *The Unitary Executive During the Third Half-Century*,<sup>23</sup> we continued our survey of presidents from Benjamin Harrison through Franklin D. Roosevelt. In the process, we carefully analyzed FDR's failed attempt to implement the Brownlow Committee's proposal to reorganize the executive branch—recognized to be a watershed moment in the history of the president's control over law execution.<sup>24</sup> This period plays a key role in arguments about the unitariness of the executive branch. Many constitutional theorists, led by Bruce Ackerman, regard the New Deal era as a constitutional moment that ratified big changes in the allocation of power within the federal government.<sup>25</sup> This period also witnessed the rise of the so-called independent agencies, which had been languishing in the aftermath of the Supreme Court's decision in *Myers v. United States*.<sup>26</sup> The anti-unitarian position did not receive any material support until 1935, when the Supreme Court reversed decades of precedent and upheld the constitutionality of congressionally imposed limitations on presidential power to remove officers charged with executing the law in *Humphrey's Executor v. United States*.<sup>27</sup>

Our prior three articles have shown that each of the first thirty-two presidents—from George Washington up through Franklin D. Roosevelt—believed in a unitary executive of the kind defended by many scholars in recent years. We now pick up the survey where we left off and examine the presidencies during the fourth half-century of our constitutional history to see the views expressed by presidents from Harry Truman through George W. Bush regarding the scope of the president's power to execute the law. As in our previous articles, in conducting our historical review of presidential practices, we employ the interpretive method known as “departmentalism” or “coordinate construction.” This approach holds that all three branches of the federal government have the power and duty to interpret the Constitution and that the meaning of the Constitution is determined through the dynamic interaction of all three branches.<sup>28</sup> The relevant inquiry is whether a long-standing and unbroken practice exists in which both Congress and presidents have acquiesced. Only if that is the case can

22. *Id.* at 788–89, 795–99.

23. Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1 (2004).

24. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2274–75 (2001); Lessig & Sunstein, *supra* note 10, at 84 n.334; Miller, *supra* note 5, at 79, 85.

25. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105–08 (1991); Bruce Ackerman & David Colove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 845–96 (1995).

26. 272 U.S. 52 (1926) (holding unconstitutional a statute purporting to prevent the President from removing postmasters without the advice and consent of the Senate).

27. 295 U.S. 602 (1935). For our discussion of *Humphrey's Executor*, see Yoo et al., *supra* note 23, at 84–89.

28. See Calabresi & Yoo, *supra* note 16, at 1463–72.

one justifiably claim that a practice has become established.<sup>29</sup> Our methodology resembles that followed by the U.S. Supreme Court in *INS v. Chadha*,<sup>30</sup> which relied on the fact that eleven of thirteen presidents from Woodrow Wilson to Ronald Reagan had refused to accede to the legislative veto in rejecting arguments that the legislative veto had become accepted under the separation of powers.<sup>31</sup>

Our historical account focuses primarily on the three devices generally viewed as necessary to any theory of the unitary executive: the president's power to remove subordinate policy-making officials at will, the president's power to direct the manner in which subordinate officials exercise discretionary executive power, and the president's power to veto or nullify such officials' exercises of discretionary executive power.<sup>32</sup> We do not claim that there is consensus among all three branches of government as to the president's control of the removal power and of the powers to direct and nullify. Rather, we claim only that there is no consistent, three-branch custom, tradition, or practice to which presidents have acquiesced permitting congressionally-imposed limits on the president's sole power to execute the law.<sup>33</sup> In the words of political scientist David E. Lewis, "Presidents usually oppose attempts to insulate" the bureaucracy from their control.<sup>34</sup> We thus reject claims that arguments regarding the proper balance of power between the legislative and the executive branches have been effectively foreclosed by history. Instead, we contend that such arguments must be resolved based on their legal and normative merits.<sup>35</sup>

We begin in Parts I through X below with a discussion of the ten presidencies between 1945 and 2004. In Part XI, we pay particularly close

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29. For the classic statement of this position, see *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915). For other examples, see *Dames & Moore v. Regan*, 453 U.S. 654, 668–69, 686 (1981); *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); *Pocket Veto Case*, 279 U.S. 655, 679–83 (1929); *Myers v. United States*, 272 U.S. 52, 170–76 (1926); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

30. 462 U.S. 919 (1983).

31. *Id.* at 942 n.13.

32. Calabresi & Yoo, *supra* note 16, at 1458.

33. *Id.*

34. DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1977*, at 15 (2003).

35. *Id.* at 24. Conceding that the Constitution's vesting of the executive power in the president suggests that

presidents are obligated to direct the executive branch of the government. In order for presidents to successfully carry out their oath of office, it is their responsibility to make sure the policies of the U.S. government are implemented effectively. To do so, they need control of the administrative apparatus of government. In short, they need the types of administrative structures that maximize presidential control.

*Id.*

attention to the rise and fall of the Ethics in Government Act, which created so-called independent counsels to prosecute wrongdoing by senior executive branch officials. We shall see that the history of the Ethics in Government Act is strikingly similar to the history of the Tenure of Office Act and would end in the Act's demise, just as we predicted in 1997.<sup>36</sup> We conclude in Part XII with a discussion of the path-breaking presidency of George W. Bush.

### I. HARRY S. TRUMAN

Harry S. Truman succeeded Franklin D. Roosevelt as president at a time when the world was consumed by war. Fortunately, as Truman's biographer Donald R. McCoy points out, his character "enabled him to make much of his on-the-job training as president. He was brisk, decisive, direct, industrious, practical, and tough."<sup>37</sup> Truman "exercised command vigorously,"<sup>38</sup> and he gets high marks as "a supremely tough, decisive leader"<sup>39</sup> who from the start was completely in control of his entire Administration. David McCullough reports that upon being sworn into office, Truman made clear to Roosevelt's cabinet that "[h]e welcomed their advice. He did not doubt that they would differ with him if they felt it necessary, but final decisions would be his and he expected their support once decisions were made."<sup>40</sup>

Despite his initial determination to continue Roosevelt's policies, Truman soon realized that "there could be no Truman administration unless he had his own people in office"<sup>41</sup> and had a cabinet that was "in entire sympathy with what I wanted to do,"<sup>42</sup> Truman therefore acted swiftly to assemble his own White House staff. Six months into his presidency, only three of the ten cabinet members Truman inherited from FDR remained.<sup>43</sup> Truman relied "more heavily on his top subordinates than had Roosevelt,"<sup>44</sup> and he "had daily meetings with his chief White House aides and at least weekly meetings with cabinet members."<sup>45</sup> McCoy describes Truman's position as follows:

Cabinet members were to help the president "carry out policies of the government; in many instances the Cabinet could be of tremendous help to the President by offering advice whether he liked it or not but when [the] President [gave] an order they

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36. Calabresi & Yoo, *supra* note 16, at 1462.

37. DONALD R. MCCOY, *THE PRESIDENCY OF HARRY S. TRUMAN* 15 (1984).

38. *Id.* at 22.

39. *Id.* at 65.

40. DAVID MCCULLOUGH, *TRUMAN* 348 (1992).

41. MCCOY, *supra* note 37, at 17.

42. *Id.* at 18.

43. *Id.* at 19.

44. *Id.* at 16.

45. *Id.*



should carry it out. I told them I expected to have a Cabinet I could depend on and take in my confidence and if this confidence was not well placed I would get a Cabinet in which I could place confidence."<sup>46</sup>

When cabinet members did not execute the law in accordance with Truman's wishes, he did not hesitate to remove them or force them to resign. For example, Secretary of Defense Louis A. Johnson was told to resign because of his "conflicts with other officials, his verbal indiscretions, his chumminess with Republicans, and his slowness in conforming to new policies during a war."<sup>47</sup> Even more dramatic was the forced resignation of Attorney General J. Howard McGrath. The sequence of events that led to McGrath's undoing began on February 1, 1952, when Truman appointed Newbold Morris as a special prosecutor to investigate alleged corruption in the Bureau of Internal Revenue and the Department of Justice's Tax Division, only the fifth occasion in history in which a special prosecutor had been named. After Morris attempted to identify senior Justice Department officials who might have taken bribes by preparing a lengthy questionnaire intended to identify those officials whose lifestyles outstripped their salaries, McGrath ordered that the questionnaires not be distributed. When Morris then sought access to McGrath's official and personal records, McGrath fired Morris, which in turn prompted Truman to fire McGrath later that same day.<sup>48</sup> The investigation was then completed by Judge James P. McGranery, who succeeded McGrath as Attorney General. Truman disagreed with McGrath's actions as a matter of policy; at no point, however, did Truman suggest that McGrath lacked the authority to dismiss Morris.<sup>49</sup>

As befitting a person with a plate on his desk proclaiming "[t]he buck stops here,"<sup>50</sup> Truman exerted direct supervisory control over other aspects of his Administration as well. Truman listened to and relied upon his White House staff and the Bureau of the Budget, but it was always "clear he was the boss, the person on whose desk 'the buck stops.' For all their influence, they were advisors, not executives or policy makers."<sup>51</sup> Truman is also seen by some as "creat[ing] the institution of the presidency"<sup>52</sup> by refining the structure of the White House staff and increasing the use of the Bureau of the Budget, the Council of Economic Advisors, and the National Security

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46. MCCOY, *supra* note 37, at 16 (quoting Harry S. Truman).

47. *Id.* at 236.

48. Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2316-17 (1998).

49. See generally KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 15-16 (1992).

50. MCCOY, *supra* note 37, at 315.

51. *Id.* at 147.

52. *Id.* at 164.

Council. The development of efficient means of using the White House staff to police the executive branch greatly enhanced the unitary executive.

From the outset, Truman defined in no uncertain terms the unitary nature of executive power in military and foreign policy matters. Indeed, Truman's "first major act after the election in November [1949] had been to instruct the State Department to open negotiations for the new alliance [NATO], and he rightly considered it his treaty."<sup>53</sup> And when faced with the incredibly burdensome and historical decision of whether the atomic bomb would be used against the Japanese, Truman took full personal responsibility as Commander in Chief.<sup>54</sup> After the attacks on Hiroshima and Nagasaki, Truman informed his cabinet that there was to be "no further use of atomic bombs without his express permission."<sup>55</sup> As Truman saw it, "the real issue was one of broad policy and that the bomb must not be the responsibility of anyone other than the president, because of his constitutional role as both Commander in Chief and Chief Magistrate."<sup>56</sup>

By the summer of 1950, Truman found himself being drawn into a major undeclared war in Korea.<sup>57</sup> This was a significant exercise of executive power, and Truman was to proceed on his own authority: He "had been advised to proceed on the basis of presidential authority alone and not bother to call on Congress for a war resolution."<sup>58</sup> This decision was characteristic of President Truman. He always kept in mind how his actions would affect future presidential authority.<sup>59</sup>

And although prominent advisors such as General Bradley, among others, seriously objected to General Douglas MacArthur's planned invasion at Inchon, Truman backed the plan. As David McCullough observes,

In time to come, little would be said or written about Truman's part in the matter—that as Commander in Chief he, and he alone, was the one with the final say in Inchon. He could have said no, and certainly the weight of opinion among his military advisers would have been on his side. But he did not. He took the chance, made the decision for which he was neither to ask nor receive anything like the credit he deserved.<sup>60</sup>

The conflict would also lead to one of the most dramatic removals ever in American history when Truman relieved General Douglas MacArthur of his command of U.S. troops in Korea for insubordination and open

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53. MCCULLOUGH, *supra* note 40, at 735.

54. *Id.* at 442.

55. *Id.* at 460.

56. *Id.* at 649.

57. *Id.* at 226–27.

58. MCCULLOUGH, *supra* note 40, at 780.

59. *Id.* at 789.

60. *Id.* at 797.

intervention in the political arena. Truman believed that MacArthur's actions posed "a danger to the fundamental principle of civilian supremacy over the military."<sup>61</sup> Against the President's direct policy of a cease-fire proposal, MacArthur had issued a communiqué to the Chinese communists in which he threatened to expand the war into the Chinese mainland.<sup>62</sup> MacArthur then, in a letter to House Minority Leader Joe Martin, voiced his opposition to the President's policy.<sup>63</sup> Truman, who had already lost faith in MacArthur as a general, decided on his own and again after meeting with the Joint Chiefs, that MacArthur was to be fired.<sup>64</sup> The criticism Truman received from Congress and the country was overwhelming. For example:

The full Republican leadership held an angry emergency meeting in Joe Martin's office at 9:30 in the morning, after which Martin talked to reporters of "impeachments," the accent on the plural. "We might want the impeachments of 1 or 50." A full-dress congressional investigation of the President's war policy was in order.<sup>65</sup>

Yet Truman would not budge and was completely unintimidated; he felt his decision was wholly within his prerogative as Commander in Chief.<sup>66</sup> The hearings proceeded, but interest in MacArthur faded.

While some spoke of Truman's firing of MacArthur as a courageous act, Truman would respond that "[c]ourage didn't have anything to do with it. . . . General MacArthur was insubordinate and I fired him. That's all there was to it."<sup>67</sup> Dean Rusk captured Truman's perspective perfectly with regard to the President's insistence on executive removal power:

Truman's conflict with MacArthur . . . was more than a clash of egos or a contest of wills; Truman was concerned about the presidency. . . . I am convinced that 95 percent of Truman's decision to fire MacArthur hinged on the relationship of the President as the Commander in Chief to his general and on civilian control of the military.<sup>68</sup>

This highly visible removal illustrates dramatically why the removal power is so important for the president if he is to be in charge of the executive branch.

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61. CHESTER J. PACH, JR. & ELMO RICHARDSON, *THE PRESIDENCY OF DWIGHT D. EISENHOWER* 17 (1991).

62. MCCULLOUGH, *supra* note 40, at 836.

63. *Id.* at 838.

64. *Id.* at 841.

65. *Id.* at 844 (quoting Martin).

66. *Id.* at 855.

67. MCCULLOUGH, *supra* note 40, at 855.

68. *Id.* (quoting Rusk).

Not only was Truman willing to exercise the removal power; he also vigorously defended it against congressional attempts to place limits on its exercise,<sup>69</sup> as evinced by his continuation of the defense of the removal power in connection with the case of *United States v. Lovett*,<sup>70</sup> begun during the Roosevelt Administration.<sup>71</sup> The *Lovett* case arose when Congress attached a rider to an appropriations bill specifying that no federal funds could be used to pay Lovett and two other named executive branch employees suspected of holding subversive views. In essence, the issue in *Lovett* was whether Congress could use its spending power to, in effect, remove executive branch employees whom the President wanted to retain. Although the Court of Claims had decided in favor of the Administration's position, it failed to provide the strong endorsement of the removal power that the Administration sought. Dissatisfied with the court's disposal of the case on nonconstitutional grounds, the Attorney General successfully petitioned for certiorari in early 1946.<sup>72</sup> The Attorney General's decision to seek Supreme Court review is telling because the outcome he desired had prevailed in the Court of Claims. Therefore the Attorney General petitioned for certiorari not to change the *result* in the judgment below, but rather to change its *rationale*.

The Truman Administration's brief on the merits primarily attacked the appropriations rider as an impermissible infringement on the President's power to remove,<sup>73</sup> as did its presentation during oral argument.<sup>74</sup> The Administration's brief specifically stated:

If the President is to perform his constitutional obligation to execute the laws, he must have power to control the subordinate officers through whom the executive function is administered. The principal control which the President has over executive officers is his power to remove them, and it has been said that he is . . . Chief of the Executive only through his power of removing appointees who are recalcitrant and unwilling to follow his wishes. Any exercise of the removal power by the legislative branch necessarily interferes with the executive power and tends to subject the executive branch to the control and domination of Congress.<sup>75</sup>

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69. LEWIS, *supra* note 34, at 21 (noting that "after Truman ascended to the White House, his enthusiasm for delegating authority to independent regulatory commissions had waned").

70. 66 F. Supp. 142 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946).

71. See Yoo et al., *supra* note 23, at 82-83.

72. John Hart Ely, *United States v. Lovett: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L.L. REV. 1, 23-25 (1975).

73. The Administration's brief devoted some forty-seven pages to its removal argument, spending the remaining fifteen pages challenging the rider as a bill of attainder. *Id.* at 28-29 (citing Brief for the Petitioner, *United States v. Lovett*, 328 U.S. 303 (1946) (No. 809)).

74. *Id.* at 30 & n.86 (citations and internal quotation marks omitted).

75. Brief for the Petitioner at 15, *United States v. Lovett*, 328 U.S. 303 (1946) (No. 809).

The Truman Administration's brief further claimed that in England the "power to remove executive officers was vested in the Crown,"<sup>76</sup> and the brief specifically cited the Vesting Clause of Article II as the source of the President's removal power.<sup>77</sup> The brief concluded its argument against a congressional power to remove Lovett by showing that the consistent practice from 1789 up through the 1940s was of presidential, not congressional, power to remove.<sup>78</sup>

Although the Supreme Court did reach the constitutional questions avoided by the Court of Claims, it upheld the Administration's position on the grounds that the statute represented a bill of attainder without reaching the removal issue.<sup>79</sup> As a result, none of the arguments on the removal power in the Administration's brief found its way into the Supreme Court's opinion. For the purposes of this Article, however, it is of no consequence that the Supreme Court chose not to base its resolution of the case on the removal power. The fact that the Truman Administration strongly opposed congressional infringement upon the removal power is sufficient to show that Truman did not acquiesce in this deviation from the unitary executive.

Having failed in its attempt to use its control over appropriations to remove certain executive officers, Congress tried to remove Commissioner of the Bureau of Reclamation Michael W. Straus and Regional Reclamation Director Richard L. Boke by arbitrarily changing the qualifications for their positions.<sup>80</sup> Truman complained that this provision, designed as it was to "effect the removal of two men now holding such positions," was "contrary to the spirit, if not the letter, of those provisions of the Constitution which guarantee the separation of legislative and executive functions."<sup>81</sup> However, because Congress had already adjourned, Truman felt that he "had no choice" but to sign the bill. At the same time, Truman indicated that "had [it] been possible to veto this bill without bringing the vital work of the Department to a standstill," he would have done so.<sup>82</sup> Congress persisted the following year, attaching a provision to a continuing resolution prohibiting the use of appropriated funds for paying Straus's or Boke's salaries.<sup>83</sup> Again Truman objected in much the same terms.<sup>84</sup> Perhaps chastened by their

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76. *Id.* at 19.

77. *Id.* at 21.

78. *Id.* at 32-48.

79. *Lovett*, 328 U.S. at 307. The House considered refusing to allocate the money to pay Watson, Dodd, and Lovett, but in the end voted 99-98 to appropriate the necessary funds. 93 CONG. REC. 2973-75, 2977, 2987-91 (1947); see also Ely, *supra* note 72, at 10 n.32, 31 n.93.

80. Interior Department Appropriation Act, ch. 754, 62 Stat. 1112, 1126 (1948).

81. Statement by the President on the Interior Department Appropriation Act (June 30, 1948), in 1948 PUB. PAPERS 390.

82. *Id.*

83. Temporary Appropriations Act of 1949, ch. 101, 63 Stat. 67.

84. Statement by the President Upon Signing the Temporary Appropriations Bill (May 12, 1949), in 1949 PUB. PAPERS 250 (1964).

defeat in *Lovett*, Congress finally backed down the following month when it deleted the changes in these offices' qualifications without having forced Straus or Boke out of their posts.<sup>85</sup>

Truman's insistence that executive power over removals not be sapped by congressional or other pressures was shown on many other occasions as well. When a member of Truman's staff, Harry Vaughn, was attacked by the media and Republicans for accepting a decoration from the Argentine dictator Juan Peron, Truman responded in blanket fashion: "No commentator or columnist names any members of my Cabinet, or my staff. . . . I name them myself. And when it is time for them to be moved on, I do the moving—nobody else."<sup>86</sup> As McCullough notes, "[i]t was a sentiment that had been felt by other presidents before him and would be often again by more who followed in his place, but that none stated so openly in so many words."<sup>87</sup> On another occasion, Republicans in both houses led by Senator Joseph McCarthy called on Truman to fire his Secretary of State, Dean Acheson, for statements Acheson had made concerning the case engineered against Alger Hiss by the House Un-American Activities Committee, (Acheson had stated to reporters that he did "not intend to turn his back on Alger Hiss").<sup>88</sup> Acheson offered to resign, but Truman would not consider such a concession. Again, Truman would not have anyone other than the president "do the moving."<sup>89</sup> When a reporter mentioned to Truman that some Republicans had called for Acheson's resignation, Truman replied that "Mr. Acheson would remain, 'Period.'"<sup>90</sup>

That said, there were occasions on which Truman did not consistently support the unitariness of the executive branch. Truman equivocated regarding the president's power to direct and overrule subordinate executive officials' exercises of discretion, as shown by his Administration during the consideration of the Reorganization Act of 1945. Although Truman's initial proposal would have included all of the independent agencies within the president's reorganization authority,<sup>91</sup> Congress refused to comply and instead followed the pattern established in the Reorganization Act of 1939,<sup>92</sup> by specifically exempting certain agencies

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85. Interior Department Appropriations Act, ch. 680, 63 Stat. 765, 778–79 (1949); *see also* Note, 1949 PUB. PAPERS 250.

86. MCCULLOUGH, *supra* note 40, at 737 (quoting Truman in *The Presidency*, TIME, Mar. 7, 1949, at 24).

87. *Id.*

88. *Id.* at 759 (quoting DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 360 (1st ed. 1969)).

89. *Id.* at 737.

90. *Id.* at 814.

91. Letter from President Truman to the 79th Congress of the United States (May 24, 1945), in H.R. REP. NO. 79-971, at 1–2 (1945).

92. *See* Yoo et al., *supra* note 23, at 93–107.

from the Act altogether and by strictly limiting the degree to which certain other agencies could be reorganized.<sup>93</sup> Truman also implicitly condoned another deviation from the unitariness of the executive branch when he recommended that Congress incorporate the legislative-veto provision of the 1939 reorganization statute into the 1945 version.<sup>94</sup> Congress, of course, took Truman at his word and included a two-house legislative veto into the 1945 Act.<sup>95</sup> Truman also tolerated the enactment of other legislative vetoes throughout his first term.<sup>96</sup>

Truman began to offer greater resistance to such intrusions after he won reelection in his own right. Building on the recommendations of the First Hoover Commission,<sup>97</sup> Truman asked in 1949 that Congress make the

93. Reorganization Act of 1945, ch. 582, § 5, 59 Stat. 613, 615–16; see also H.R. REP. NO. 79-971, at 6, 10–11 (1945); S. REP. NO. 79-638, at 4–5 (1945).

94. Truman noted that under that arrangement, “necessary control is reserved to the Congress since it may, by simple majority vote of the two Houses, nullify any action of the President which does not meet with its approval.” Letter from President Truman to the Congress of the United States (May 24, 1945), in H.R. REP. NO. 79-971, at 2.

95. § 6(a), 59 Stat. at 613, 616. The Senate even dallied with shifting to a one-house legislative veto, S. REP. NO. 79-638, *supra* note 93, at 3, but in the end it backed down and retained the two-house veto. Robert W. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 581 n.46 (1953) (citing 91 CONG. REC. 10,269–74, 10,714 (1945)).

96. For a discussion of other legislative vetoes accepted during Truman’s first term, see Ginnane, *supra* note 95, at 583–86, 603–04. See generally Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273, 283 [hereinafter Fisher, *Legislative Veto*]; Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57, 80 (1990) [hereinafter Fisher, *Interpretation Outside the Courts*]; H. Lee Watson, Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1019–21 (1975).

97. The Commission called for a clear line of control from the President to these department and agency heads and from him to their subordinates. COMM’N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV’T, GENERAL MANAGEMENT OF THE EXECUTIVE BRANCH: A REPORT TO THE CONGRESS I (1949). The Commission elaborated:

Responsibility and accountability are impossible without authority—the power to direct. The exercise of authority is impossible without a clear line of command from the top to the bottom, and a return line of responsibility and accountability from the bottom to the top.

*Id.* Far from posing a threat to free and responsible government, “strength and unity in an executive make clear who is responsible for faults in administration and thus enable the legislature better to enforce accountability to the people.” *Id.* at 2 (citing THE FEDERALIST NO. 70 (Alexander Hamilton)). However, such lines of authority and accountability “[have] been weakened, or actually broken, in many places and in many ways.” *Id.* at 4. As the Commission found:

That line of responsibility still exists in constitutional theory, but it has been worn away by administrative practices, by political pressures, and by detailed statutory provisions. Statutory powers often have been vested in subordinate officers in such a way as to deny authority to the President or a department head.

*Id.* at 4; see also Letter from Herbert Hoover to Kenneth McKellar, President pro tempore, United States Senate (Jan. 13, 1949), in S. REP. NO. 81-232, at 3 (1949) (“[W]e must reorganize

president's authority to reorganize the government permanent and extend it to cover all governmental agencies, including the independent regulatory commissions. (Surprisingly, "it was the Republican Congress of 1947-48 that created the Hoover Commission to reorganize the executive branch with an eye toward presidential control.")<sup>98</sup> In Truman's eyes, "the new reorganization act should be comprehensive in scope; no agency or function of the executive branch should be exempted from its operation."<sup>99</sup> Truman's growing support for the unitariness of the executive branch, however, was still incomplete: his recommendation continued to condone the legislative veto procedure contained in the Reorganization Acts of 1939 and 1945 "whereby a reorganization plan submitted to the Congress by the President becomes effective in 60 days unless rejected by both Houses of Congress."<sup>100</sup>

Congress accepted the gist of Truman's proposal and removed all of the exemptions, except for those governing the Comptroller General and the General Accounting Office. Congress did exact a price for surrendering its ability to protect specific agencies that were of special interest to its

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the executive branch to give it the simplicity of structure, the unity of purpose, and the clear line of executive authority that was originally intended under the Constitution."). Therefore, the Commission recommended that all agencies be placed within executive departments and that all independent authorities granted to subordinate executive officials by statute or appropriations rider be eliminated. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, *supra*, at 32, 34. The Commission also recommended that Congress not exempt any agencies from the President's reorganization authority, including in particular the independent regulatory commissions. Furthermore, Congress should not place any limitations based on an agency's "independent exercise of quasi-legislative or quasi-judicial functions." *Id.* at xi. Such phrases are too "vague and of uncertain meaning" and would only inhibit the President's proper control over the executive branch. *Id.*

98. LEWIS, *supra* note 34, at 55.

99. Message from President to the Congress (Jan. 17, 1949), in S. REP. NO. 81-232, at 4, 5.

100. *Id.* at 5. In support of this proposal, the Attorney General's Office issued a memorandum repudiating Attorney General Mitchell's formalist critique of the legislative veto. The memorandum reasoned that legislative vetoes did not represent "an improper legislative encroachment upon the Executive in the performance of functions delegated to him by the Congress . . . . [T]he authority given to the President to reorganize the Government is legally and adequately vested in the President when the Congress takes the initial step of passing a reorganization act." Thus Congress simply reserved "the right to disapprove action taken by the President under the statutory grant of authority." Letter and Memorandum from Peyton Ford, Assistant to the Attorney General, to John L. McClellan, Chairman of the Senate Committee on Expenditures (Mar. 17, 1949), reprinted in S. REP. NO. 81-232, at 18, 20.

In fact, the memorandum did not regard the legislative veto as being any more sinister than a provision requiring that the executive branch report its intended actions to Congress and then wait for a specified period of time:

It cannot be questioned that the President in carrying out his Executive functions may consult with whom he pleases . . . . There would appear to be no reason why the Executive may not be given express statutory authority to communicate to the Congress his intention to perform a given Executive function unless the Congress by some stated means indicates its disapproval.

*Id.* at 20.



members: it added the requirement that all proposed changes to certain agencies be contained in a single reorganization plan unmingled with reorganizations affecting other agencies and broadened the two-house legislative veto into a one-house legislative veto.<sup>101</sup>

Truman immediately used this authority to assert greater presidential control over the independent agencies. Again building off of the recommendations of the First Hoover Commission,<sup>102</sup> Truman submitted a reorganization plan on June 20, 1949, making sweeping changes to bring the United States Maritime Commission under more direct control of the executive branch.<sup>103</sup> The following year, Truman submitted a similar series of plans proposing centralization of the executive and administrative functions of all of the independent agencies in the Chairman and making the Chairman appointable and removable at will by the president.<sup>104</sup> Congress's response demonstrated the legislative veto's effectiveness in interfering with the proper functioning of the executive branch. Even though Congress had dropped the specific exemptions for the independent agencies from the Reorganization Act of 1949, Congress was still able to frustrate Truman's efforts to assert greater control over the ICC, FCC, and

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101. Reorganization Act of 1949, ch. 226, § 6(a), 63 Stat. 203, 205. See generally Ginnane, *supra* note 95, at 581–82; Watson, *supra* note 96, at 1013, 1014 n.143.

102. Although the Commission stopped short of the Brownlow Committee's challenge to the independent agencies' constitutionality, it still leveled several criticisms at their structure. First, it complained that the independent agencies' exercise of executive authority was cumbersome and badly coordinated with the rest of the executive branch. Therefore, the Commission recommended that "all administrative responsibility be vested in the chairman of the commission," and that a number of executive functions be transferred to Cabinet Departments. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, REGULATORY COMMISSIONS: A REPORT TO THE CONGRESS 5, 12–13 (1949). Finally, the Commission's task force recommended that the President be given the authority to designate and remove at will the particular commissioners who would serve as Chairman. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON REGULATORY COMMISSIONS app. N, at viii, 13–14, 31–33 (1949). For similar views, see ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 683–84 (1941).

103. Reorg. Plan No. 6 of 1949, 3 C.F.R. 1001 (1949–1953). Another plan abolished the United States Maritime Commission and transferred its functions in part to the Secretary of Commerce and in part to the newly constituted, semi-independent Federal Maritime Board within the Commerce Department. Reorg. Plan No. 21 of 1950, 3 C.F.R. 1012 (1949–1953); see also Itzhak Zamir, *Administrative Control of Administrative Action*, 57 CAL. L. REV. 866, 903 n.180 (1969).

104. Reorg. Plan No. 7 of 1950, H.R. DOC. NO. 81-511, at 1, 2, (1950) (ICC); Reorg. Plan No. 8 of 1950, 3 C.F.R. 1005 (1949–1953) (FTC); Reorg. Plan No. 9 of 1950, 3 C.F.R. 1005 (1949–1953) (FPC); Reorg. Plan No. 10 of 1950, 3 C.F.R. 1006 (1949–1953) (Securities and Exchange Commission); Reorg. Plan No. 11 of 1950, H.R. DOC. NO. 81-515 (1950) (FCC); Reorg. Plan No. 12 of 1950, H.R. DOC. NO. 81-516, at 1, 2, (1950) (NLRB); Reorg. Plan No. 13 of 1950, 3 C.F.R. 1006 (1949–1953) (Civil Aeronautics Board).

NLRB by exercising its legislative veto over the plans to reorganize those agencies.<sup>105</sup>

Perhaps in response to the mischief caused by these legislative vetoes, Truman began objecting to the legislative veto as an improper interference with the independence of the executive branch. Truman's first protest arose when Congress revived the provision requiring that government publications be subject to the prior approval of the Joint Committee on Printing<sup>106</sup> that had drawn the wrath of both Presidents Wilson and Hoover several decades earlier.<sup>107</sup> Truman signed this legislation, but objected to it as an "invasion of the rights of the executive branch by a legislative committee."<sup>108</sup> Although Truman acknowledged Congress's right to establish printing policies and to place limits on the printing activities of the executive branch, "restrictions imposed by the Congress should be left to the executive agencies to administer."<sup>109</sup> Although Truman did propose substitute legislation to eliminate this problem, Congress took no action on it.<sup>110</sup>

Truman offered even stronger resistance to subsequent congressional efforts to control executive discretion. In 1951, when Congress attempted to enact a provision requiring that all significant military real estate projects be approved in advance by the Armed Services Committees similar to one that Roosevelt had previously tolerated,<sup>111</sup> Truman drew the line. Concerned by Congress's increasing tendency to attempt to influence the execution and administration of the laws, Truman vetoed the legislation. As Truman reasoned, "Under our system of Government it is contemplated that the Congress will enact the laws and will leave their administration and execution to the executive branch."<sup>112</sup> The House voted 312 to 68 to override the veto.<sup>113</sup> The Senate, however, took no action, and the veto stood. Four months later, however, Congress was able to frustrate Truman's

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105. 96 CONG. REC. 6886 (1950) (reporting the Senate's rejection of Reorganization Plan No. 12 (NLRB)); *id.* at 7173 (reporting the Senate's rejection of Reorganization Plan No. 7 (ICC)); *id.* at 7177 (reporting the Senate's rejection of Reorganization Plan No. 11 (FCC)); *see also* Angel M. Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 486 (1994) (citing MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 134-37 (1955)).

106. Act of July 5, 1949, ch. 296, 63 Stat. 405, 406.

107. *See* Yoo et al., *supra* note 23, at 51-52.

108. Statement by the President on Government Printing and Binding (July 5, 1949), in 1949 PUB. PAPERS 346, 347.

109. *Id.*

110. Watson, *supra* note 96, at 1019 (citing JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 218 (1964)).

111. *See* Yoo et al., *supra* note 23, at 92.

112. Veto of Bill Relating to Land Acquisition and Disposal Actions by the Army, Navy, Air Force, and Federal Civil Defense Administration (May 15, 1951), in 1951 PUB. PAPERS 280, 282.

113. 97 CONG. REC. 5434, 5444-45 (1951).

efforts to oppose the legislative veto by attaching an almost identical provision to the Military Construction Act of 1951.<sup>114</sup> Because of the urgent need for the legislation, the President had no choice but to sign it.<sup>115</sup>

Truman continued his opposition to legislative vetoes the following year when he pocket vetoed a bill that would have required the Postmaster General to "come into agreement" with the Public Works Committees before consummating lease-purchase contracts for the construction of post offices. Truman objected because the bill "contain[ed] a provision which would infringe upon the functions of the Executive branch to such an extent that I feel I cannot give my approval."<sup>116</sup> According to Truman, it was improper to "giv[e] Committees veto power over executive functions authorized by the Congress to be carried out by executive agencies."<sup>117</sup> Thus, by the end of his term, Truman's metamorphosis into a steadfast opponent of the legislative veto was complete.

Truman's vigor as president was further illustrated by the frequency of his vetoes.<sup>118</sup> In the tradition of that great Democratic president, Andrew Jackson, Truman liked to portray himself as "the tribune of the people" and as "the people's president."<sup>119</sup> Truman cast himself as the people's champion against the special interest groups that held significant sway with Congress. In the 1948 campaign, he saw the contest as being between "Truman—the world class champion of peace, prosperity, democracy, and the people—fighting against special interests at home and authoritarianism abroad."<sup>120</sup> As Truman said explicitly on September 18, 1948, at a campaign stop: "The issue is the people against the special interests."<sup>121</sup>

Another major exercise of the executive power occurred when Truman invoked the authority vested in him "by the Constitution and the laws of the United States" and issued a pair of executive orders directing all cabinet secretaries to institute programs to ensure nondiscrimination in federal employment<sup>122</sup> and in the military.<sup>123</sup> That these orders were based on the president's inherent authority appears to have been no accident, as evidenced by the fact that Truman invoked specific statutory authority when

114. Ch. 434, § 601, 65 Stat. 336, 365.

115. See Fisher, *Legislative Veto*, *supra* note 96, at 282–83; Ginnane, *supra* note 95, at 603–04; Watson, *supra* note 96, at 1019–20 (citing HARRIS, *supra* note 110, at 222).

116. Memorandum of Disapproval of Bill Authorizing the Postmaster General to Lease Quarters for Post Office Purposes (July 19, 1952), in 1952–53 PUB. PAPERS 488.

117. *Id.*; see also Fisher, *Interpretation Outside the Courts*, *supra* note 96, at 80; Fisher, *Legislative Veto*, *supra* note 96, at 283; Watson, *supra* note 96, at 1020.

118. MCCOY, *supra* note 37, at 62.

119. *Id.* at 104, 106.

120. *Id.* at 159.

121. *Id.* at 161.

122. Exec. Order No. 9980, 3 C.F.R. 720 (1943–48).

123. Exec. Order No. 9981, 3 C.F.R. 722 (1943–48). In this second order, Truman also invoked his authority as Commander in Chief. *Id.*

issuing a similar executive order mandating nondiscrimination in government contracting.<sup>124</sup> McCoy reports that "by the time Truman left office, the work of this committee would lead to substantial racial integration in the military and to fairer procedures for promotion and training."<sup>125</sup> Black Americans saw these executive orders as "unprecedented since the time of Lincoln."<sup>126</sup>

One of the most famous controversies of the Truman Administration involved the President's decision to seize the steel mills, which led to the U.S. Supreme Court's famous *Steel Seizure* decision—a decision that limits executive power although in a way that is wholly consistent with the theory of the unitary executive. "The steel crisis had been brewing since late 1951, when it became clear that the United Steelworkers wanted a large wage increase."<sup>127</sup> On April 8, 1952, Truman directed his Commerce Secretary, Charles Sawyer, "to take over and continue the operation of the steel mills, because a 'work stoppage would immediately jeopardize and imperil our national defense.'"<sup>128</sup> Signing Executive Order No. 10340, Truman saw his emergency action as mandated and sanctioned by his office. "These are not normal times" he stated, "I have to think of our soldiers in Korea . . . the weapons and ammunition they need."<sup>129</sup> Significantly:

[f]rom his reading of history, Truman was convinced his action fell within his powers as President and Commander in Chief. In a state of national emergency, Lincoln had suspended the right to *habeas corpus*, he would point out. Tom Clark, now on the Supreme Court, had once, as Attorney General, advised him that a President, faced with a calamitous strike, had the 'inherent' power to prevent a paralysis of the national economy.<sup>130</sup>

[Truman] acknowledged the power of Congress to supersede his policy and act on its own to pass a new law enabling the

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124. Exec. Order No. 10,308, 3 C.F.R. 837 (1949–53); see also *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 466 (5th Cir. 1977) (concluding that Truman issued these orders pursuant to his "war powers"); *Contractors Ass'n v. Sec'y of Labor*, 442 F.2d 159, 169 (3d Cir. 1971) (concluding that Truman issued these orders pursuant to his "national defense powers," while referencing several statutory bases); Note, *Executive Order 11,246 and Reverse Discrimination Challenges: Presidential Authority to Require Affirmative Action*, 54 N.Y.U. L. REV. 376, 382–83, 387 (1979) (concluding that Truman's order was issued under his "presidential war powers" and "national defense powers" rather than under any statutory authority). But see Andrée Kahn Blumstein, Note, *Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246*, 33 VAND. L. REV. 921, 924 (1980) (suggesting that Truman based the executive orders on statutory grounds).

125. MCCOY, *supra* note 37, at 109.

126. *Id.*

127. *Id.* at 290.

128. *Id.* at 291.

129. MCCULLOUGH, *supra* note 40, at 896.

130. *Id.* at 896–97.

government to operate the mills as an emergency measure. Such legislation, he said, might be "very desirable." But Congress did not choose to grant him such power. Instead, there were calls for congressional investigations, calls for his impeachment.<sup>131</sup>

Truman's action, in fact, led to an uproar, with members of the House calling for impeachment and members of the Senate attempting to restrict the use of federal funds for the steel mills. Furthermore, several attempts were made to resolve the crisis through litigation.<sup>132</sup> The district court issued an order enjoining the seizure on April 29th, and the government took the case directly up to the Supreme Court for its resolution.<sup>133</sup>

In its brief in the *Steel Seizure* case, the Truman Administration vigorously pressed the view that the Vesting Clause of Article II is a generalized grant of power to the president. The Administration's brief explicitly said:

Section 1 of Article II provides that "the executive Power shall be vested in a President of the United States of America." In our view, this clause constitutes a grant of all the executive powers of which the government is capable. Remembering that we do not have a parliamentary form of Government but rather a tripartite system which contemplates a vigorous executive, it seems plain that Clause 1 of Article II cannot be read as a mere restricted definition which would leave the Chief Executive without ready power to deal with emergencies.<sup>134</sup>

The brief also pointed to the Take Care Clause, as construed in *Cunningham v. Neagle*<sup>135</sup> and in *In re Debs*<sup>136</sup> as justifying President Truman's seizure of the steel mills.<sup>137</sup> The brief went on to note numerous actions by presidents where property was taken in wartime, beginning with the War of 1812 and continuing "during the administrations of Presidents Lincoln, Wilson, and Franklin Roosevelt."<sup>138</sup> The brief also cited *Inland Waterways Corp.*

131. *Id.* at 899.

132. MCCOY, *supra* note 37, at 292.

133. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (D.D.C.), *aff'd*, 343 U.S. 579 (1952).

134. Brief for Petitioner at 96-97, *Youngstown Sheet & Tube Co.* (Nos. 744 and 745) (citing *Myers v. United States*, 272 U.S. 52 (1926)); THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388-89 (1913); CHARLES THACH, THE CREATION OF THE PRESIDENCY, 1775-1789, chs. 4-5 (1922); THE FEDERALIST, NOS. 70 AND 71; Letter from Alexander Hamilton to George Washington (Sept. 15, 1790), in 4 THE WORKS OF ALEXANDER HAMILTON 313, 338 (Henry Cabot Lodge ed., 1904)).

135. 135 U.S. 1 (1890). For our review of the *Neagle* case, see Yoo et al., *supra* note 23, at 12-16.

136. 158 U.S. 564 (1895). For our review of the *Debs* case, see Yoo et al., *supra* note 23, at 18-20.

137. Brief for Petitioner at 98, *Youngstown Sheet & Tube Co.* (Nos. 744 and 745).

138. *Id.* at 103-05.

*v. Young*<sup>139</sup> and *United States v. Midwest Oil Co.*<sup>140</sup> for the proposition that constitutional power "when the text is doubtful, may be established by usage."<sup>141</sup>

The *Steel Seizure* case involved a far more sweeping claim of executive power than we assert when we say the Vesting and Take Care Clauses give the president power over removals and law execution. Thus, for our purposes, the fact that the Truman Administration also claimed those clauses enabled it to seize the steel mills means only that Truman is another in a long line of presidents to read the Article II Vesting Clause as a grant of power to the president alone. The Supreme Court, of course, rebuffed the Truman Administration in the *Steel Seizure* case and, most damagingly, Justice Robert Jackson explicitly said in his famous concurrence that the Article II Vesting Clause is a mere designation of the title of the president and is not an affirmative grant of the executive power.<sup>142</sup> Other justices did not follow Jackson on this point, with Justice Felix Frankfurter in his concurrence accepting the notion that long-established custom or usage could be a "gloss on the 'executive power' vested in the President by § 1 of Art. II."<sup>143</sup> Obviously, given that this series of Articles is premised on the notion that presidential construction of the Vesting and Take Care Clauses as authorizing a presidential power over removal and law execution is supported by a tradition of executive branch construction over the last 215 years, we would disagree with this view.

We agree with the Court's ruling in *Youngstown* that the President's executive power did not authorize a seizure of the steel plants on the facts presented in that case. We think this does not change the fact, however, that the Vesting Clause of Article II is a sweeping grant of power to the President, as the Truman Administration argued it was. Thus, by the end of his tenure in the White House, Truman had adopted a position largely consistent with the unitary executive, strongly defending the President's removal power, using his reorganization powers to assert his control over the independent agencies, and objecting to the legislative veto as an unconstitutional infringement on the President's power to execute the laws. Truman stopped short of condemning the independent agencies as unconstitutional and did permit the enactment of a few additional legislative vetoes without registering any objection.<sup>144</sup> Yet, Truman's level of opposition to congressional infringements on the unitary executive on constitutional

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139. 309 U.S. 517, 525 (1940).

140. 236 U.S. 459, 472-73 (1915).

141. Brief for Petitioner at 121, *Youngstown Sheet & Tube Co.* (Nos. 744 and 745).

142. 343 U.S. at 640-41 (Jackson, J., concurring in the judgment).

143. *Id.* at 610-11 (Frankfurter, J., concurring).

144. See, e.g., Act of July 15, 1952, ch. 758, § 1413, 66 Stat. 637, 661. See generally Ginnane, *supra* note 95, at 604; Watson, *supra* note 96, at 1020.

grounds was sufficient to preclude the inference that Truman acquiesced in them for the purposes of coordinate construction.

## II. DWIGHT D. EISENHOWER

In sharp contrast to Franklin D. Roosevelt and Harry S. Truman, Dwight D. Eisenhower did not aspire to be an activist president. As a career soldier, he considered it his duty to remain above politics, and he consistently strove to operate behind-the-scenes when guiding national policy. As his biographers, Chester J. Pach, Jr., and Elmo Richardson, observe, "[a]t a time of widespread discontent with the 'imperial presidency,' restraint in the exercise of presidential power looked far more attractive than it had a decade earlier."<sup>145</sup> The general consensus of historians, however, is that Eisenhower "only appeared to be a passive chief executive. He actually used his power vigorously and deftly, but often behind the scenes, to achieve his goals."<sup>146</sup> One of the reasons why people believed Eisenhower was not in control of his Administration was that he would sometimes deliberately duck questions at press conferences by pretending to garble his syntax. Pach and Richardson note, "Critics seized upon such responses as evidence that the president did not know what was going on in his own administration. Usually he did, but his spontaneous oral statements seemed to suggest otherwise."<sup>147</sup>

Eisenhower's penchant for behind the scenes management of his Administration has led political scientist Fred I. Greenstein to label "this method of governing 'hidden-hand leadership.'" Eisenhower made the critical policy decisions, but he carefully muffled his responsibility.<sup>148</sup> Pach and Richardson note that a cost of hidden-hand leadership is that "it created the appearance that Eisenhower was not in charge of his own administration" even when he was, in fact, highly skilled politically.<sup>149</sup> Another reason Eisenhower was not perceived as being actively in charge of his Administration was his penchant for delegation. Eisenhower's leadership style was very much the product of his prior career as a general.

Rather than grapple with matters that puzzled or bored him, he acted as any general would—he delegated the task to a subordinate. John Foster Dulles thus handled foreign affairs; George M. Humphrey shaped economic policy; Sherman Adams took responsibility for a host of domestic matters. . . . The president presided over his administration, but he did not run it.<sup>150</sup>

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145. PACH & RICHARDSON, *supra* note 61, at xii.

146. *Id.*

147. *Id.* at 41.

148. *Id.* at 42.

149. *Id.*

150. *Id.* at xi.

Eisenhower also relied heavily upon his Attorney General designate, Herbert Brownell, Jr., and on his longtime friend and associate, Gen. Lucius D. Clay, in picking the other members of his cabinet.<sup>151</sup> He was also the first president to make the Director of the Bureau of the Budget<sup>152</sup>—an office of vital importance to the unitary executive that had been created under the Harding Administration and moved to the White House by FDR—a member of the cabinet.<sup>153</sup>

Eisenhower's willingness to delegate responsibility should not be confused with a lack of willingness to assert control over the conduct of his Administration:

Contemporaries often misunderstood Eisenhower's style of leadership; they mistook, for example, his delegation of authority for his abdication of it. Despite these misapprehensions, Eisenhower was in control of his presidency from its inception. Indeed during the months between his election and inauguration, he carefully organized an administration that reflected his style of leadership and his assessment of the needs of the nation.<sup>154</sup>

This style of leadership carried through Eisenhower's presidency. Thus, at the end of his presidency, when reporters asked him about giving Nixon more responsibility in light of the upcoming election, Eisenhower responded flatly "that he alone could make the decisions . . . [and] if a decision had to be made, *I'm* going to decide it according to *my* judgment."<sup>155</sup> Later, Eisenhower commented:

I don't see why people can't understand this: No one can make a decision except me. . . . I have all sorts of advisors, and one of the principal ones is Mr. Nixon. . . . Now, if you talk about other people sharing a decision, how can they? No one can because then who is going to be responsible?<sup>156</sup>

There can be no doubt that Eisenhower executed his office in full adherence to the principle that the president, and only the president, ran the executive branch.

Eisenhower took several steps to enhance and assert his authority to direct and review the actions of his subordinates. When Congress included a provision in the Defense Reorganization Act of 1958 requiring the Secretary of Defense to submit his reorganization plans directly to Congress without

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151. *Id.* at 34.

152. *Id.* at 37.

153. See Yoo et al., *supra* note 23, at 60–61, 64–65, 80–81 (detailing the creation of the Bureau of the Budget under Harding, Coolidge, and FDR).

154. PACH & RICHARDSON, *supra* note 61, at 29.

155. STEPHEN E. AMBROSE, *EISENHOWER: SOLDIER AND PRESIDENT* 524 (1990).

156. *Id.* at 525.



presidential oversight,<sup>157</sup> Eisenhower flatly instructed the Secretary to submit any such plans to him before transmitting them to Congress.<sup>158</sup> Eisenhower also unsuccessfully backed the Second Hoover Commission's recommendation to consolidate all federal legal services in the Department of Justice.<sup>159</sup> Even without such centralization, Eisenhower did not hesitate to intervene in the legal affairs of the federal government, at one point even personally drafting part of the brief in *Brown v. Board of Education*.<sup>160</sup>

Indeed, *Brown* set the stage for one of the most courageous examples of presidential determination to enforce the law in our nation's history. After the Court handed down its landmark opinion in *Brown*, Eisenhower made it clear that his duty as president and citizen was compliance with the Supreme Court's order: "The Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country; and I will obey."<sup>161</sup> Pach and Richardson note, "Indeed only a day after the decision, Eisenhower asked the Board of Commissioners of the District of Columbia to set an example of peaceful desegregation."<sup>162</sup>

In September of 1957, Little Rock, Arkansas, erupted in violent opposition to court-ordered school integration. Eisenhower denounced the "mob of extremists" and pledged to use "whatever force may be necessary . . . to carry out the orders of the Federal Court."<sup>163</sup> Hours later, Eisenhower ordered "Gen. Maxwell D. Taylor, the army chief of staff, to dispatch 1,000 paratroopers from the 101st Airborne Division to Little Rock"

157. Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 3, 72 Stat. 514, 515.

158. Watson, *supra* note 96, at 1014 n.143 (citing HARRIS, *supra* note 110, at 210).

159. The Second Hoover Commission believed that such consolidation of legal services was required to promote efficiency and policy coordination. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 16-17 (1955). Other aspects of the Commission's report, such as their recommendation that lawyers be covered by a separate civil service system in order to insulate them from politicians and career civil servants, were less favorable to the unitary executive. *Id.* at 12-14. Even with such protections, Congress rejected the proposal because of its concerns that the centralization of legal services would limit their ability to oversee agencies. Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 265 (1994); James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY. L. REV. 1569, 1582 (1996) (citing JAMES M. STRINE, *THE OFFICE OF LEGAL COUNSEL: LEGAL PROFESSIONALS IN A POLITICAL SYSTEM* 71 (1992)).

160. 347 U.S. 83 (1954). For Eisenhower's role in drafting the brief, see Devins, *supra* note 159, at 284 (citing Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 817-19 (1987) (interviewing Philip Elman)).

161. The President's News Conference (May 19, 1954), in 1954 PUB. PAPERS 489, 491, quoted in PACH & RICHARDSON, *supra* note 61, at 142.

162. PACH & RICHARDSON, *supra* note 61, at 142.

163. *Id.* at 152-53.

and federalized the Arkansas National Guard.<sup>164</sup> The President "wanted Taylor to move quickly in order to demonstrate how rapidly the Army could respond. Within a few hours, Taylor had five hundred paratroopers of the 101st Airborne Division in Little Rock; another five hundred were there by nightfall."<sup>165</sup> Eisenhower felt a critical sense of duty

to protect the Constitution and uphold federal law. Despite his own reservations about the *Brown* decision, he could not turn his back on a mob that tried to substitute its will for that of a federal judge. "If the day comes when we can obey orders of our Courts only when we personally approve of them," he reminded Swede Hazlett, "the end of the American system, as we know it, will not be far off."<sup>166</sup>

It was for this reason that Dwight D. Eisenhower became the first president since Ulysses S. Grant to send troops to the South to protect the civil rights of African Americans.<sup>167</sup> The sending of U.S. troops to Little Rock "served notice that riotous obstruction of federal court orders might provoke the armed intervention of the national government, a possibility that had been unthinkable for eighty years."<sup>168</sup> "[A]t the critical moment, he lived up to his oath of office. In the process, he convinced most white southerners that they could not use force to prevent integration."<sup>169</sup> Eisenhower further opposed racial discrimination by renewing and extending the executive orders first initiated during the FDR and Truman Administrations<sup>170</sup> prohibiting discrimination in federal contracting and employment. Unlike his predecessors, Eisenhower explicitly based his orders on statutory rather than constitutional grounds.<sup>171</sup>

The Eisenhower Administration also preserved the unitariness of the executive branch through his policies with respect to the civil service system. As of the 1950s, the civil service laws did not impose any substantive limits on the president's removal power.<sup>172</sup> The governing statute provided that

164. *Id.* at 153.

165. AMBROSE, *supra* note 155, at 447.

166. PACH & RICHARDSON, *supra* note 61, at 154 (quoting Dwight D. Eisenhower).

167. *Id.*

168. *Id.* at 157.

169. AMBROSE, *supra* note 155, at 448.

170. See *supra* notes 122–24 and accompanying text; Yoo et al., *supra* note 23, at 81.

171. Exec. Order No. 10,577, pmb. & § 4.2, 3 C.F.R. 218, 218, 220–21 (1954–58) (invoking the president's authority under 5 U.S.C. § 631 (2000); the Civil Service Act of 1883, ch. 27, 22 Stat. 403; and 3 U.S.C. § 301); Exec. Order No. 10,479, 3 C.F.R. 961 (1949–53) (invoking the president's authority under the Act of May 3, 1945, ch. 106, § 214, 59 Stat. 106, 134); see also Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 170 (3d Cir. 1971).

172. See Gerald Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 947–72 (1976); see also Maheshwar Nath Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U. L. REV. 287, 309 (1968) (noting that as of the end of the 1950s the law did not provide government employees with any remedy against

officials could be removed from the civil service only "for such cause as will promote the efficiency of said service."<sup>173</sup> Although on its face this language would appear to give federal officials covered by the civil service laws substantive protections against dismissal, both the executive branch and the courts had repeatedly construed this language as not placing any substantive limits on the executive branch's unlimited discretion in determining what constitutes adequate cause for removal.<sup>174</sup> Congress had enacted the Veterans' Preference Act of 1944, giving veterans certain procedural protections, providing them with written notice of removals, the right to submit a reply, and the right to appeal adverse disciplinary actions to the Civil Service Commission.<sup>175</sup> The 1944 legislation did not alter the substantive standards governing removal, and courts continued to construe it as not placing any restrictions on the exercise of the president's removal authority.<sup>176</sup> For example, in *Bailey v. Richardson*,<sup>177</sup> the D.C. Circuit reviewed what it regarded as an unbroken 160-year history of judicial noninterference in removals and concluded, "No function is more completely internal to a branch of government than the selection and retention or dismissal of its employees."<sup>178</sup> The Civil Service Commission was thus limited to conducting informal investigations to ensure compliance with procedural requirements,<sup>179</sup> even decisions with respect to procedural compliance were not made binding on agencies until 1948.<sup>180</sup>

The Supreme Court would acknowledge one narrow restriction on the president's removal power by protecting federal employees against dismissal for exercising constitutionally protected activity.<sup>181</sup> Such a limitation was concededly quite narrow<sup>182</sup> and was also consistent with the provisions of the Civil Service Act of 1883 preventing supervisors from requiring federal

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arbitrary removal); Richard A. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 199 (1973) (same).

173. Lloyd-LaFollette Act of 1912, ch. 389, § 6, 37 Stat. 539, 555.

174. See Yoo et al., *supra* note 23, at 11–12, 22–23, 27–28, 36–37, 44–45, 108–09.

175. Veterans' Preference Act of 1944, ch. 359, § 14, 58 Stat. 387, 390.

176. See Levy v. Woods, 171 F.2d 145, 145–46 (D.C. Cir. 1948); Asher v. Forrestal, 71 F. Supp. 470, 471 (D.D.C. 1947); Culligan v. United States, 107 Ct. Cl. 222, 223 (1946). See generally Yoo et al., *supra* note 23, at 90–91.

177. 182 F.2d 46 (D.C. Cir. 1950).

178. *Id.* at 58.

179. See Egon Guttman, *The Development and Exercise of Appellate Powers in Adverse Action Appeals*, 19 AM. U. L. REV. 323, 331 (1970).

180. Act of June 22, 1948, ch. 604, 62 Stat. 575, 575; see Merrill, *supra* note 172, at 213.

181. The seminal case is *Wieman v. Updegraff*, 344 U.S. 183, 191–92 (1952). See also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573–75 (1968); *Slochower v. Bd. of Educ.*, 350 U.S. 551, 559 (1956); *Bailey v. Richardson*, 182 F.2d 46, 69 (D.C. Cir. 1950) (Edgerton, J., dissenting), *aff'd mem. by an equally divided Court*, 341 U.S. 918 (1951).

182. See Frug, *supra* note 172, at 972–74. For example, it does not bar the limits on federal employees' political activities imposed by the Hatch Act. See *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 558 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 80–81 (1946).

employees to pay political assessments or engage in political activity in order to keep their jobs.<sup>183</sup> Most importantly, the Court would subsequently make clear that the doctrine prohibiting removals for the exercise of constitutionally protected activity did not apply to removals related to job performance.<sup>184</sup> This would be demonstrated most eloquently by the Court's decision in *Cafeteria and Restaurant Workers Local 473 v. McElroy*,<sup>185</sup> in which the Court "summarily denied" the existence of limits on the removal power in cases involving "the Federal Government's dispatch of its own affairs."<sup>186</sup> The Court indicated that the executive branch had the unfettered discretion to deny a security clearance to an employee of a government contractor whose garrulousness posed a security risk.<sup>187</sup>

At times, the Civil Service Commission did seek a greater role in reviewing the substance of agency removal decisions.<sup>188</sup> This recommendation was effectively quashed by the harsh criticism of it leveled by the Second Hoover Commission. As the Commission noted:

A judicial proceeding . . . leads to the worst kind of supervisor-employee relations because it requires the building of a written record and the accumulation of formal evidence sufficient to stand up as a support for the supervisor's action. It relieves the employee of any necessity for demonstrating his competence and usefulness to his department, and in effect, guarantees him a job unless his supervisor can prove in a formal proceeding that he is incompetent. This leads to working situations which are intolerable.

If the supervisor acts on his best judgment, he normally disciplines or separates an employee as soon as the misconduct occurs or the incompetence is evident. But, if he does so, he may be unable to substantiate his action judicially because he has not waited to accumulate documentary evidence.<sup>189</sup>

The Eisenhower Administration also strongly asserted the unitariness of the executive branch by exerting control over the independent agencies. Here, Eisenhower drew again upon the recommendations of the Second Hoover Commission<sup>190</sup> and a report by Professor Emmette Redford

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183. See Yoo et al., *supra* note 23, at 11, 22-23, 27, 36-37.

184. *Pickering*, 391 U.S. at 573 n.5; *Slochower*, 350 U.S. at 559.

185. 367 U.S. 886 (1961).

186. *Id.* at 896.

187. *Id.* at 899.

188. See 48 U.S. CIVIL SERV. COMM'N ANN. REP. 41 (1931); Guttman, *supra* note 179, at 332.

189. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON PERSONNEL AND CIVIL SERVICE 96 (1955).

190. The Second Hoover Commission called for greater coordination of government operations and recommended the transfer of all adjudicative functions of the independent

requested by the President toward the end of his Administration, which emphasized the need for greater presidential control over the independent agencies in order to ensure proper leadership and guidance in policy development.<sup>191</sup> Eisenhower used a wide variety of means to influence the independent agencies. He conducted policy studies on specific areas of agency jurisdiction, jawboned individual commissioners, issued policy statements and suggestions, and notified the commissions about his budgetary and legislative priorities.<sup>192</sup> Eisenhower even tried to turn the independent agency commission chairmen into executive officers by giving them second hats as special assistants to the President. However, congressional opposition and jealousy from other agency officials quickly put an end to this practice.<sup>193</sup> Although the Eisenhower Administration did not completely ignore the agencies' supposed independence,<sup>194</sup> there can be little question that it asserted control over them when possible.

The issue of presidential control over the independent agencies came to a head when Eisenhower removed Myron Wiener and Georgia Lusk after they refused to resign from the War Claims Commission, a body created to provide compensation to persons injured by the enemy during World War II. Eisenhower based his actions solely on the importance of presidential superintendence over the execution of federal law, noting that he "regard[ed] it as in the national interest to complete the administration of

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regulatory commissions to a newly created Administrative Court. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 239-56, 269-82 (1955); see also Moreno, *supra* note 105, at 487 (citing HERBERT EMMERICH, *FEDERAL ORGANIZATION AND ADMINISTRATIVE MANAGEMENT* 101-28 (1971)).

191. EMMETTE S. REDFORD, *THE PRESIDENT AND THE REGULATORY COMMISSIONS* (Nov. 17, 1960) (unpublished report) (on file with the Iowa Law Review). Redford later published a modified version of this study, in which he concluded, "The President should have responsibility for leadership and guidance of the commissions in the development of policies to implement the objectives embodied in law." Emmette S. Redford, *The President and the Regulatory Commissions*, 44 TEX. L. REV. 288, 307 (1965). Only when authority over the commissions was returned to the President could the President fulfill the "constitutional and statutory responsibilities which separately and cumulatively require his attention to many policy aspects of regulation" as well as "the expectancy of people that the President will supply unity and leadership in the execution of the laws." *Id.* at 308. Therefore, Redford recommended that the President be given the authority to issue policy guidance to the commissions, to designate and remove the chairmen of all of the commissions at pleasure, and to have greater latitude to dismiss commissioners. *Id.* at 309-12.

192. See Redford, *supra* note 191, at 303-04.

193. Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1410 (1975).

194. One of Eisenhower's Solicitors General observed that he knew of no case in which the Administration "ha[d] precluded an independent agency from presenting its position," even when that position conflicted with that of the Administration. Devins, *supra* note 159, at 289 (quoting Robert L. Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A.J. 154, 157 (1960)).

the War Claims Act of 1948, as amended, with personnel of my own selection."<sup>195</sup>

Wiener brought suit in the Court of Claims challenging his removal, and the case eventually reached the Supreme Court.<sup>196</sup> In its brief, the Eisenhower Administration defended its actions primarily on unitariness grounds.<sup>197</sup> The brief began its summary of argument section by stating:

A constitutional usage which goes back to the very first year in which the Constitution became effective establishes that the President has the unlimited power to remove all the "officers of the United States" appointed by him, subject only to constitutional or statutory restrictions with respect to non-executive officers.

The President's removal power rests essentially on three considerations: first, the canon of construction well known to the Founding Fathers that the power to appoint carries with it the power to remove; second, the President's constitutional duty to take care that the laws be faithfully executed—a duty which cannot be performed if the President is unable to control the officers who carry out the laws; and third, the postulate of executive unity—i.e., that the President is the head of the entire executive branch.<sup>198</sup>

The brief went on to argue two clearly correct propositions, both of which were destined to be rejected by the Supreme Court. First, the brief argued that Wiener was a core executive employee and that he was thus outside the ambit of *Humphrey's Executor v. United States*,<sup>199</sup> which sanctioned congressionally imposed limitations on the president's removal power of quasi-legislative and quasi-judicial officers. Second, the brief argued that even if Wiener were seen as being a quasi-judicial employee, the case was still outside the ambit of *Humphrey's Executor* because Congress had been utterly silent about removal in the statute setting up the War Claims Commission. In *Shurtleff v. United States*,<sup>200</sup> the Supreme Court had previously imposed a clear statement rule, holding that it would not construe any statute as limiting the president's removal power unless Congress employed "very clear

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195. Letter from Dwight D. Eisenhower to Myron Wiener (Dec. 10, 1953), *quoted in* Wiener v. United States, 357 U.S. 349, 350 (1958).

196. Wiener brought an action in the Court of Claims to recover the salary he would have been paid had he not been removed. The Court of Claims dismissed this action on the grounds that Congress had not intended to impose any restrictions on the removal of War Claims Commissioners. Wiener v. United States, 142 F. Supp. 910, 910 (Ct. Cl. 1956), *rev'd*, 357 U.S. 349 (1958) (citing *Shurtleff v. United States*, 189 U.S. 311, 315–16 (1903)).

197. Brief for the United States at 21–68, *Wiener* (No. 52).

198. *Id.* at 15–16.

199. 295 U.S. 602, 629 (1935).

200. 189 U.S. 311 (1903). For our review of the *Shurtleff* case, see Yoo et al., *supra* note 23, at 25–26.

and explicit language" indicating that such was its intent.<sup>201</sup> Statutory language merely stating that an officer may be removed for "inefficiency, neglect of duty or malfeasance in office" was not sufficient.<sup>202</sup> As the Court of Claims had noted,<sup>203</sup> the statute at issue in *Wiener* was completely silent as to removal, providing only that the Commission wind up its affairs no later than three years after the last claim was filed.<sup>204</sup> Under *Shurtleff*, the government argued, the relevant statute should not be construed as limiting the president's unfettered authority to remove Wiener.

In a remarkably brief and thinly reasoned opinion by Justice Frankfurter, the Supreme Court unanimously concluded that Eisenhower lacked the power to remove Wiener even though, as the Court twice noted, the statute did not purport to place any limits on the removal power.<sup>205</sup> Instead, the Court inferred Congress's desire to impose such limits from the fact that War Claims Commissioners were quasi-judicial officers.<sup>206</sup> In so holding, the Court took the remarkable step of implicitly reversing the presumption acknowledged in *Shurtleff* against construing statutes as limiting the removal power, at least when quasi-judicial officers were involved. To do so without any significant analysis of the considerations that led the *Shurtleff* Court to erect the presumption in the first place was quite unfortunate.

From the standpoint of politics, *Wiener* can be regarded as the converse of *Humphrey's Executor*. While *Humphrey's Executor* represented an attempt by a largely conservative Supreme Court to snub a president who was considerably more progressive,<sup>207</sup> *Wiener* represented a decision by a mostly New Deal Supreme Court that rebuked a president seeking to take the administration of federal law in a different direction. For purposes of this Article, it matters little that the Eisenhower Administration's arguments in *Wiener* ultimately proved unsuccessful.<sup>208</sup> What matters is that the Eisenhower Administration's defense of the removal power effectively undercuts any inference of acquiescence by Eisenhower to a non-unitary executive under the principles of coordinate construction.

201. *Shurtleff*, 189 U.S. at 315.

202. *Id.* at 315-18.

203. *Wiener v. United States*, 142 F. Supp. at 914.

204. War Claims Act of 1948, ch. 826, § 2(d), 62 Stat. 1240, 1241. The filing deadline was eventually postponed until March 31, 1952. Act of Apr. 5, 1951, ch. 27, 65 Stat. 28; Act of May 27, 1949, ch. 145, 63 Stat. 112.

205. *Wiener*, 357 U.S. 349, 350, 352 (1958).

206. *Id.* at 353-54.

207. Yoo et al., *supra* note 23, at 88.

208. A parallel claim filed by Commissioner Lusk was settled without litigation. *Lusk v. United States*, 173 Ct. Cl. 291, 294-95 (1965), *cert. denied*, 383 U.S. 967 (1966). Eisenhower eventually abolished the War Claims Commission in 1954. Reorg. Plan No. 1 of 1954, § 4(a), 3 C.F.R. 442, 443 (1954-58). See generally Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 750 (1987).

Just as Eisenhower was content to assume more of a background, supervisory role in the conduct of executive affairs, Eisenhower was also measured in his dealings with Congress, insisting that FDR and Truman "had upset the constitutional equilibrium between the White House and Capitol Hill and promis[ing] to exercise restraint in order to restore the balance."<sup>209</sup> Eisenhower's desire to rebalance the relationship between the presidency and Congress should not be taken, however, as a sign of any reluctance to defend the unitariness of the executive branch. As we shall see, Eisenhower resolutely defended presidential power. Most notably, Eisenhower outdid the Truman Administration in opposing the legislative veto as infringing on the president's power to execute the law.<sup>210</sup>

Eisenhower's first objection to a legislative veto appeared in his May 25, 1954, veto of a bill that would have required the Secretary of the Army to "come into agreement" with both the House and Senate Armed Services Committees before transferring the Camp Blanding Military Reservation to the State of Florida. Eisenhower vetoed the bill because by "plac[ing] the power to make such agreement jointly in the Secretary of the Army and the members of the Committees on Armed Services," the bill "violate[d] the fundamental constitutional principle of separation of powers prescribed in articles I and II of the Constitution which place the legislative power in the Congress and the executive power in the executive branch."<sup>211</sup> Eisenhower supported this conclusion with a forceful exposition against placing executive functions outside of the executive branch:

The making of such a contract or agreement on behalf of the United States is a purely executive or administrative function, like the negotiation and execution of government contracts generally. Thus, while Congress may enact legislation governing the making of Government contracts, it may not delegate to its members or committees the power to make such contracts, either directly or by giving to them a power to approve or disapprove a contract which an executive officer proposes to make.<sup>212</sup>

Echoing Hamilton's pronouncements in *The Federalist No. 70*, Eisenhower concluded that "such a procedure destroys the clear lines of responsibility for results which the Constitution provides."<sup>213</sup>

209. PACH & RICHARDSON, *supra* note 61, at 50.

210. Watson, *supra* note 96, at 1021.

211. Dwight D. Eisenhower, Message (May 25, 1954), in 100 CONG. REC. 7135 (1954).

212. *Id.*

213. *Id.*; see also Fisher, *Legislative Veto*, *supra* note 96, at 283; Watson, *supra* note 96, at 1021. Other members of the Eisenhower Administration had already voiced their opposition to the legislative veto during the debates on a proposal similar to the one pocket-vetoed by Truman, see *supra* notes 116-17 and accompanying text, that would have required the Administrator of General Services or the Postmaster General to come into agreement with the Committees on Public Works before acquiring property for the construction of post offices. H.R. 6342, 83d



Eisenhower continued his opposition to the legislative veto the following year in a signing statement accompanying the Defense Appropriations Act of 1956.<sup>214</sup> In an attempt to thwart Eisenhower's attempt to privatize many of the Department of Defense's functions, members of Congress whose districts contained military facilities likely to be adversely affected attached a rider requiring that the Administration justify to the House and Senate Appropriations Committees that the "discontinuance is economically sound and the work is capable of performance by a contractor without danger to the national security" before transferring work to a contractor and by subjecting all such transfers to a committee veto.<sup>215</sup> Eisenhower signed the bill even though he believed that the justification and committee veto provisions were unconstitutional. In language reminiscent of his objections to the Camp Blanding bill, Eisenhower acknowledged that "Congress has the power and the right to grant or to deny an appropriation."<sup>216</sup> However, backed by the advice of Attorney General Brownell,<sup>217</sup> Eisenhower maintained that "once an appropriation is made the appropriation must, under the Constitution, be administered by the

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Cong. § 41(e) (1954). The Justice Department issued a memorandum objecting that such a provision would violate Article II of the Constitution, which "vests the Executive power in the President and directs that 'he shall take care that the laws be faithfully executed.'" Memorandum from J. Lee Rankin, to Senator Knowland (Apr. 8, 1954), *reprinted in* 100 CONG. REC. 4879 (1954) (citing U.S. CONST. art. 2, § 3). Although Congress could overturn a particular executive action through formal legislation, "Congress may not through its committees administer or share in the administration of a statute." *Id.* Allowing Congress to interfere in this matter would represent "a departure from our constitutional practice which, if systematically pursued, could result in a radical change in the distribution of the powers of the Federal Government." *Id.* After the Senate declined to delete this provision by a vote of sixty to eight, 100 CONG. REC. 10017 (1954), the Justice Department transmitted an even more detailed memorandum to the Chairman of the House Committee on Public Works. In response to these objections and Eisenhower's veto of the Camp Blanding legislation, the conference committee struck the committee-veto provision and replaced it with a requirement directed at Congress prohibiting the appropriation of any funds without prior approval from the Public Works Committee. Act of July 22, 1954, ch. 560, § 411, 68 Stat. 518, 519; *see also* Watershed Protection and Flood Prevention Act of 1954, ch. 656, § 2, 68 Stat. 666, 666 (applying a similar provision to "works of improvement"). Since this restriction was directed at Congress and not the executive, Attorney General Brownell advised Eisenhower to sign the bill. *See generally* 41 Op. Att'y Gen. 300, 305 (1957); Fisher, *Legislative Veto*, *supra* note 96, at 284; Watson, *supra* note 96, at 1023 (citing HARRIS, *supra* note 110, at 231).

214. Defense Appropriations Act of 1956, ch. 358, 69 Stat. 301.

215. *Id.* § 638, 69 Stat. at 321.

216. Special Message to the Congress upon Signing the Department of Defense Appropriation Act (July 13, 1955), in 1955 PUB. PAPERS 688, 689.

217. Brownell concluded that the legislative-veto provision violated Article II of the Constitution by "usurp[ing] power confided to the executive branch" and by intruding into the authority "to engage in the administration and execution of the law, which by constitutional warrant, has been the responsibility and right of the executive branch since the founding of our constitutional form of Government." 41 Op. Att'y Gen. 230, 231 (1955). Brownell also anticipated the Supreme Court's decision in *Chadha* by noting that the provision raised problems under Article I as well. *Id.* *See generally* Fisher, *Legislative Veto*, *supra* note 96, at 283-84.

executive branch of the Government alone, and the Congress has no right to confer upon its committees the power to veto Executive action or to prevent Executive action from becoming effective."<sup>218</sup> In so observing, Eisenhower embraced a strongly formalist vision of the separation of powers: "The Constitution of the United States divides the functions of the Government into three departments—the legislative, the executive, and the judicial—and establishes the principle that they shall be kept separate. Neither may exercise functions belonging to the others."<sup>219</sup> Accordingly, Eisenhower felt "bound to insist that Executive functions be maintained unimpaired by legislative encroachment" and refused "[t]o acquiesce in a provision that seeks to encroach upon the proper authority of the Executive."<sup>220</sup> Therefore, Eisenhower insisted:

[T]o the extent that this section seeks to give to the Appropriations Committees of the Senate and House of Representatives authority to veto or prevent Executive action, such section will be regarded as invalid by the executive branch of the Government . . . unless otherwise determined by a court of competent jurisdiction.<sup>221</sup>

Eisenhower's announced refusal to enforce the provision touched off a confrontation between the President and the Comptroller General. Recognizing his role as "the agent of the Congress," the Comptroller General informed Congress that he would enforce the law and disallow any covered expenditure that did not gain committee approval.<sup>222</sup> Facing personal liability for issuing checks without the Comptroller General's approval, the Defense Department personnel ignored the President's wishes and complied with the committee-veto provision. Further conflict was averted when the provision was dropped the following year.<sup>223</sup>

Three days after signing the Defense Appropriations Act, Eisenhower vetoed yet another bill because it contained two legislative-veto provisions.<sup>224</sup>

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218. Special Message to the Congress upon Signing the Department of Defense Appropriation Act, *supra* note 216, at 689.

219. *Id.* at 688–89.

220. *Id.* at 689.

221. *Id.*

222. Porter Hardy, Jr., No. B-124985, 1955 WL 1368, 1955 WL 2073 (Comp. Gen. Aug. 17, 1955).

223. Congress intended to shift the committee veto from the Appropriations Committees to the Armed Services Committees. However, the bill transferring the committee veto died in the Senate. See generally Watson, *supra* note 96, at 1022–23 (citing HARRIS, *supra* note 110, at 229–30).

224. Veto of Bill Authorizing Certain Construction at Military Installations (July 16, 1956), in 1956 PUB. PAPERS 596 (vetoing H.R. 9893, 84th Cong. (1956)). Section 301 of the bill made the authorizations for the Talos missile program contingent upon an agreement between the Secretary of Defense and the Armed Services Committees of each House. Section 419 imposed a similar requirement on contracts for the construction and acquisition of housing for military families. *Id.* at 596–97.

As before, Eisenhower indicated that such committee vetoes "would destroy the clear lines of responsibility which the Constitution provides."<sup>225</sup> In response to the veto, Congress changed the legislative veto into a "report and wait" provision, which afforded executive action the force of law, but delayed its effective date for a fixed amount of time so that Congress could decide whether to enact formal legislation revoking the action.<sup>226</sup> Because "report and wait" provisions do not purport to give Congress the authority to effect a change in the law without having to comply with the constitutionally required process for enacting legislation, this amendment eliminated Eisenhower's constitutional concerns. Congress later returned to the legislative veto by enacting a provision requiring congressional committee approval of all contracts authorized by the Small Reclamation Projects Act of 1956.<sup>227</sup> Eisenhower again registered his constitutional objections. He believed that committee vetoes, to the extent that they could be regarded as an executive act, constituted "an unconstitutional infringement of the separation of powers prescribed in Articles I and II of the Constitution."<sup>228</sup> As Eisenhower further explained:

I do not believe that the Congress can validly delegate to one of its committees the power to prevent executive actions taken pursuant to law. To do so in this case would be to divide the responsibility for administering the program between the Secretary of the Interior and the designated committees. Such a procedure would be a clear violation of the separation of powers within the Government and

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225. *Id.* at 597. Eisenhower further noted:

While the Congress may enact legislation governing the making of Government contracts, it may not constitutionally delegate to its Members or Committees the power to make such contracts, either directly or by giving them the authority to approve or disapprove a contract which an executive officer proposes to make.

Two years ago I returned, without my approval, a bill . . . containing similar provisions. At that time I stated that such provisions violate the fundamental constitutional principle of separation of powers prescribed in Articles I and II of the Constitution, which place the legislative power in the Congress and the executive power in the Executive Branch.

Once again, I must object to such a serious departure from the separation of powers as provided by the Constitution. Any such departure from constitutional procedures must be avoided.

*Id.*

226. Act of Aug. 3, 1956, ch. 939, § 419, 70 Stat. 991, 1018-19; *see also* Watson, *supra* note 96, at 1021 n.190.

227. Small Reclamation Projects Act of 1956, ch. 792, § 4(c), 70 Stat. 1044, 1045.

228. Statement by the President Upon Signing the Small Reclamation Projects Act of 1956 (Aug. 6, 1956), in 1956 PUB. PAPERS 648, 649.

would destroy the lines of responsibility which the Constitution provides.<sup>229</sup>

The Committee veto also violated Article II by itself. As Eisenhower noted:

[T]he negotiation and execution of a contract is a purely executive function. Although the Congress may prescribe the standards and conditions under which executive officials may enter into contracts, it may not lodge in its committees or members the power to make such contracts, either directly or by giving them the power to approve or disapprove a contract which an executive officer proposes to make.<sup>230</sup>

Eisenhower nonetheless "approved this bill only because the Congress is not in session to receive and act upon a veto message and because I have been assured that the committees which handled the bill in the Congress will take action to correct its deficiencies early in the next session."<sup>231</sup> In the meantime, the President directed the Secretary of the Interior to initiate the programs covered by the Act in the expectation that Congress would remove or revise the objectionable section.<sup>232</sup> As Eisenhower predicted, Congress replaced the committee veto with a "no appropriation" provision the next session.<sup>233</sup>

Although Eisenhower did accede without objection to a few legislative vetoes,<sup>234</sup> Eisenhower subsequently objected to a provision providing a two-house legislative veto over TVA power projects,<sup>235</sup> successfully called for the repeal of the provision enacted during the Truman Administration giving a legislative veto to a single member of Congress,<sup>236</sup> and questioned the

229. *Id.* at 649-50. Alternatively, to the extent to which the committee veto exercised a legislative function, "the section is open to the objection that it involves an unlawful delegation by the Congress to its committees of a legislative function which the constitution contemplates the Congress itself, as an entity, should exercise." *Id.* at 649. See generally JOHN R. BOLTON, *THE LEGISLATIVE VETO: UNSEPARATING THE POWERS* 11-12 (1977).

230. Statement by the President, *supra* note 228, at 650.

231. *Id.* at 649.

232. *Id.* at 650.

233. Act of June 5, 1957, Pub. L. No. 85-47, sec. (b), § 4(d), 71 Stat. 48, 49; see also Watson, *supra* note 96, at 1024.

234. Notably, Congress included a one-house veto in the Reorganization Act of 1957, Pub. L. No. 85-286, 71 Stat. 611, and the Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 3, 72 Stat. 514, 514-16. In 1960, at the request of the General Services Administration, Congress also restored a committee-veto provision to the Public Buildings Act of 1959, Pub. L. No. 86-249, § 7, 73 Stat. 479, 480. See also Act of July 12, 1960, Pub. L. No. 86-626, 74 Stat. 425, 431; Act of Sept. 8, 1960, Pub. L. No. 86-722, 74 Stat. 821, 826. See generally Watson, *supra* note 96, at 1013 n.143, 1025 & nn.214-15.

235. Statement by the President Upon Signing a Bill Amending the Tennessee Valley Authority Act (Aug. 6, 1959), in 1959 PUB. PAPERS 566 (objecting to Act of Aug. 14, 1959, Pub. L. No. 86-157, 73 Stat. 338); see also Joseph Cooper & Ann Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 470 n.11 (1962).

236. See Watson, *supra* note 96, at 1020 (citing HARRIS, *supra* note 110, at 225).

constitutionality of a provision subjecting the Attorney General's decisions to parole certain refugees into the United States to a legislative veto<sup>237</sup> that would eventually give rise to the decision in *INS v. Chadha*.<sup>238</sup>

But Eisenhower's most sustained opposition to the legislative veto was his attempt to overturn the committee veto in the Military Construction Act of 1951 (to which Truman had acceded<sup>239</sup>) that subjected all major military real-estate transactions to the approval of the Armed Services Committees.<sup>240</sup> Bolstered by the recommendations of the second Hoover Commission<sup>241</sup> and the criticism of other Administration officials,<sup>242</sup> Eisenhower's 1961 Budget Message directed the Secretary of Defense to "disregard the section unless a court of competent jurisdiction determines otherwise."<sup>243</sup> In the end, Congress relented and converted the committee veto into a constitutionally permissible "report and wait" requirement.<sup>244</sup>

237. Eisenhower noted:

The Attorney General has advised me that there is a serious question as to whether this provision is constitutional. Nevertheless, in view of the short period for which this power is given and the improbability that the issue will arise, it is believed that it would be better to defer a determination of the effect of such possible action until it is taken.

*Statement by the President Upon Signing Bill Providing for the Admission of Refugees* (July 14, 1960), in 1960-61 PUB. PAPERS 579, 579. As the *Chadha* decision attests, Eisenhower was wrong in his estimates both of the act's limited duration and of the likelihood of conflict arising under it.

238. 462 U.S. 919 (1983).

239. See *supra* notes 114-15 and accompanying text.

240. Military Construction Act of 1951, ch. 434, § 601, 65 Stat. 336, 365.

241. "The commission . . . questions the appropriateness of congressional committee participation in the executive function of operation on the ground that it is an invasion of the executive by the legislative branch." COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, REAL PROPERTY MANAGEMENT 35-36 (1955); see also COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON REAL PROPERTY MANAGEMENT 92-94, 99 (1955).

242. See 41 Op. Att'y Gen. 300 (1957).

243. DWIGHT D. EISENHOWER, THE BUDGET OF THE UNITED STATES GOVERNMENT FOR THE FISCAL YEAR ENDING JUNE 30, 1961, H.R. DOC. NO. 86-255, pt. I, at M18 (1960).

244. Act of June 8, 1960, Pub. L. No. 86-500, § 2662, 74 Stat. 166, 186-87; see also H.R. REP. NO. 86-1307, at 43-45 (1960). It was no coincidence that the vast majority of the legislative-veto provisions that Eisenhower blocked were aimed at the acquisition and disposition of military facilities. See Watson, *supra* note 96, at 1023-25. As Professor Calabresi has noted, the incentives that members of Congress face leave them little choice but to try to protect the interests of their local constituencies even when those actions would be ill-advised as a matter of national policy. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 34-35, 58-70 (1995). Thus it is unsurprising that Congress has most strenuously attempted to inject itself into the execution of the laws in those situations where the consequences for local constituencies were the greatest. As Professor Joseph Harris noted, "The requirement of advance approval by congressional subcommittees enables members of Congress to resist the closing of military installations in their districts, and it cannot be doubted that the effect is to force the retention of installations that in the interest of economy should be closed." HARRIS, *supra* note 110, at 223.

Eisenhower took a number of other steps to defend the president's sole authority to execute the law. Eisenhower quietly opposed an amendment to the U.S. Constitution, proposed by Senator John Bricker, designed to curb presidential power over foreign affairs by barring the use of executive agreements and prohibiting the negotiation of any treaty that abridged constitutional rights or affected "any other matters essentially within the domestic jurisdiction of the United States."<sup>245</sup> Eisenhower steadfastly opposed the amendment on the grounds that it would "cripple the Executive power to the point that we [would] become helpless in world affairs."<sup>246</sup>

On the issue of executive privilege, Eisenhower dealt Senator Joe McCarthy a "stunning blow by invoking executive privilege to prevent congressional interrogation of members of the executive branch."<sup>247</sup> Pach and Richardson call this "the boldest assertion of executive privilege in the history of the republic."<sup>248</sup> Eisenhower maintained that "Congress has absolutely no right to ask them to testify in any way, shape or form about the advice that they were giving to me at any time on any subject."<sup>249</sup> He felt that McCarthy's requests were an unacceptable infringement upon executive autonomy. "What was at stake, as Eisenhower saw it, was the modern Presidency. . . . There were so many things Eisenhower felt he had to keep secret . . . that he was willing to vastly expand the powers of the Presidency to do it."<sup>250</sup> In a letter directing the withholding of information from McCarthy's committee, Eisenhower stated:

It is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters . . . it is not in the public interest that *any* of their conversations or communications, or *any* documents or reproductions, concerning such advice be disclosed.<sup>251</sup>

Indeed, Eisenhower's response to McCarthy constituted "the most absolute assertion of presidential right to withhold information from Congress ever uttered to that day in American history. Earlier presidents had held that their conversations in Cabinet meetings were privileged and confidential,

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245. S.J. Res. 102, 82d Cong. (1951), *see also* 97 CONG. REC. 8258, 8265 (1951) (statement of Sen. Bricker introducing S.J. Res. 102).

246. PACH & RICHARDSON, *supra* note 61, at 60, 247-49.

247. *Id.* at 70.

248. *Id.*

249. AMBROSE, *supra* note 155, at 364 (quoting President Eisenhower on May 14, 1954).

250. *Id.* at 365 (quoting President Eisenhower on May 17, 1954).

251. *Id.*

but none had ever dared extend this privilege to *everybody* in the Executive branch."<sup>252</sup>

McCarthy made the mistake of publicly appealing to federal employees to disregard Eisenhower's directive and testify irrespective of the President's invocation of the executive privilege.<sup>253</sup> A furious Eisenhower made sure that the issue came up at his next press conference in order to tell reporters "that in my opinion this is the most arrogant invitation to subversion and disloyalty that I have ever heard of. I won't stand for it for one minute."<sup>254</sup> In the end, Eisenhower's actions so severely crippled the senator, by robbing him of his subpoena power, that McCarthy eventually crumbled.

Thus, by the end of his Administration, Eisenhower had defended the removal power, had asserted his control over the executive branch and the independent agencies, had resisted congressional attempts to interfere with the execution of the laws through the legislative veto, and had taken other actions to assert the unitariness of the executive branch. There was no acquiescence in any diminution of the unity of the executive branch during the Eisenhower years.

### III. JOHN F. KENNEDY

John F. Kennedy "sought to be a strong, active president" "in the Democratic tradition of Woodrow Wilson, Franklin D. Roosevelt, and Harry S. Truman."<sup>255</sup> In 1958 he wrote, "When the Executive fails to lead . . . it leaves a vacuum that the Legislative branch is ill-equipped to fill."<sup>256</sup> In his criticism, he "charged the executive branch with having had a 'failure of nerve,' . . . The key words were *challenges, vigorous, fight*, and the need for a president ready to 'exercise the fullest powers of his office.'"<sup>257</sup> Kennedy's splendid inaugural address immediately demonstrated his talent for using the bully pulpit of the presidency. His call for national service—"[a]sk not what your country can do for you—ask what you can do for your country"<sup>258</sup>—marked a return to a vision of the President as a leader and shaper of public opinion.

From the outset of his Administration, Kennedy was determined to exercise full control over the executive branch, illustrated most dramatically by his decision to appoint his brother Robert to the post of Attorney General. Although the decision drew significant criticism, James Giglio, Kennedy's biographer, reports that the President "knew that in Robert

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252. *Id.*

253. *Id.* at 366.

254. AMBROSE, *supra* note 155, at 366.

255. JAMES N. GIGLIO, *THE PRESIDENCY OF JOHN F. KENNEDY* 29 (1991).

256. John F. Kennedy, *When the Executive Fails to Lead*, *THE REPORTER*, Sept. 18, 1958, at 14, quoted in HERBERT S. PARMET, *JFK: THE PRESIDENCY OF JOHN F. KENNEDY* 9 (1983).

257. PARMET, *supra* note 256, at 9.

258. Inaugural Address (Jan. 20, 1961), in 1961 PUB. PAPERS 1, 3.

Kennedy he had his most trusted associate on board."<sup>259</sup> It would be hard for a president to do more to retain control over the law execution function than by appointing his closest sibling and former campaign manager to run his Justice Department.

In structuring his cabinet and White House staff, Kennedy was critical of the extent to which Eisenhower had relied upon cabinet government. He saw this as "a ponderous bureaucratic system, resulting in group or corporate decisions."<sup>260</sup> Giglio notes, "Kennedy specifically objected to the extent to which Eisenhower had shared power with the cabinet (which met weekly); the chief of staff, Sherman Adams; and the National Security Council (NSC), created in 1947 to advise the President on foreign and domestic policy."<sup>261</sup> Giglio reports:

As president, Kennedy proved less willing to delegate power outside the Oval Office. His staff, far smaller than Eisenhower's or Johnson's, consisted for the most part of loyalists from the Senate or his campaign staff, many of them still in their thirties. They remained completely devoted to Kennedy and knew exactly what he wanted.<sup>262</sup>

Kennedy was reluctant to meet regularly with the cabinet, and preferred to communicate with his officials indirectly.<sup>263</sup> Kennedy received weekly written summaries from cabinet department heads about their most significant activities. He followed these up with requests for additional information and communicated with cabinet members through his White House staff.<sup>264</sup> Kennedy met frequently with certain favored cabinet members, particularly his brother Robert who was his "lightning rod for untested ideas and [his closest] personal adviser."<sup>265</sup> The most prominent removal during the Kennedy Administration was Chester Bowles, the Undersecretary of State, where "[i]deology and personal displeasure" both played a role.<sup>266</sup> Bowles was summarily handed a press release indicating that George Ball would replace him.<sup>267</sup> As Bobby recalled: "The President snuck up on him one day and got him fired before he knew it."<sup>268</sup> Behind the

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259. GIGLIO, *supra* note 255, at 21.

260. *Id.* at 30.

261. *Id.*

262. *Id.*

263. *Id.* at 34.

264. GIGLIO, *supra* note 255, at 34.

265. *Id.* at 35.

266. *Id.* at 92.

267. *Id.* at 93.

268. PARMET, *supra* note 256, at 204.



dismissal was "[i]ndeed the effort to clarify the lines of authority within the State Department."<sup>269</sup>

Kennedy's dynamism led him to exert his power over the execution of federal laws to its fullest. For example, Kennedy followed the practice of FDR, Truman, and Eisenhower<sup>270</sup> by issuing executive orders prohibiting all federal officers and government contractors from engaging in discrimination. This nondiscrimination mandate was now to be enforced by the newly created President's Committee on Equal Employment Opportunity.<sup>271</sup> Kennedy's nondiscrimination orders exceeded the scope of previous orders by requiring that all government contractors undertake "affirmative action to ensure that . . . employees are treated during their employment, without regard to race, creed, color, or national origin."<sup>272</sup> In issuing these orders, Kennedy returned to the practice followed by FDR and Truman and based the orders on "the authority vested in . . . [the president] by the Constitution and the statutes."<sup>273</sup> The Comptroller General acknowledged that, "[i]n this instance the Executive order is not based on any Congressional directive. The authority to issue the order must, therefore, stem from the general executive power under Article II of the Constitution."<sup>274</sup> The Attorney General concurred, claiming that Congress's failure to object to presidential nondiscrimination orders meant that Congress had acquiesced in the president's power to issue such orders.<sup>275</sup>

Kennedy also used his power as Commander in Chief to take care to enforce civil rights. When James Meredith, a black student, attempted to join the all-white student body of the University of Mississippi at Oxford, violence ensued. Kennedy "issued a proclamation calling on obstructionists to cease their activities and disperse peaceably. Hundreds of marshals were dispatched to the site, and they were reinforced by federalizing the Mississippi National Guard and the deployment of U.S. troops to the Millington Naval Air Station at Memphis."<sup>276</sup> Kennedy further took a leading

269. *Id.*

270. See Yoo et al., *supra* note 23, at 81; *supra* notes 122–24, 170–71 and accompanying text.

271. Exec. Order No. 10,925, §§ 101–204, 3 C.F.R. 448, 448–49 (1959–63); Exec. Order No. 11,114, 3 C.F.R. 774 (1959–63).

272. Exec. Order No. 10,925, § 301(1), 3 C.F.R. at 450; Exec. Order No. 11,114, § 301(1), 3 C.F.R. at 776–77.

273. Exec. Order No. 10,925, pmbl., 3 C.F.R. at 448 ; Exec. Order No. 11,114, pmbl., 3 C.F.R. at 775 .

274. 40 Comp. Gen. 592, 593 (1961); see also Note, *supra* note 124, at 391 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)) (suggesting that the nondiscrimination orders might fall within the president's implied authority to act in the absence of a contrary statute).

275. Validity of Executive Order Prohibiting Government Contractors from Discriminating in Employment Practices on Grounds of Race, Color, Religion, or National Origin, 42 Op. Att'y Gen. 97, 106–07 (1961).

276. PARMET, *supra* note 256, at 261.

role in helping two blacks register at the University of Alabama over the opposition of Alabama's segregationist governor, George Wallace. "Kennedy federalized the Alabama National Guard, signaling Wallace that he intended to enforce the court order militarily if necessary."<sup>277</sup>

The Kennedy Administration also issued an executive order making small changes in the civil service laws. As noted earlier, these laws did not yet give federal employees any substantive protection against dismissal.<sup>278</sup> Although some lower court decisions took small steps toward restricting the removal power,<sup>279</sup> real limits would not emerge until Supreme Court cases in the 1970s.<sup>280</sup> Indeed, decisions from the Kennedy era continued to reaffirm that a supervisor's lack of confidence in a subordinate was by itself sufficient grounds for removal.<sup>281</sup> Veterans, who comprised roughly half of the federal workforce,<sup>282</sup> did enjoy a greater degree of procedural protection than nonveterans.<sup>283</sup> Kennedy eliminated this discrepancy by issuing an executive order extending procedural protections similar to those provided by the Veterans Preference Act of 1944 to nonveterans as well. He thus required that each agency establish a system for hearings and appeals.<sup>284</sup> Although this change did not place any substantive limits on the president's authority to remove,<sup>285</sup> it did attest to Kennedy's belief in his authority to exercise control over the entirety of the federal bureaucracy.

277. GIGLIO, *supra* note 255, at 179–80.

278. See *supra* notes 172–89 and accompanying text.

279. See *Deak v. Pace*, 185 F.2d 997, 999–1000 (D.C. Cir. 1950); *Gadsden v. United States*, 78 F. Supp. 126, 127–28 (Ct. Cl. 1948) (indicating that a removed employee has the right to the "honest judgment" of the removing officer and that the decision must not be "arbitrary or capricious" or rendered in "bad faith"); *Greenway v. United States*, 163 Ct. Cl. 72, 81 (1963) (ruling that a removed employee is entitled to "honest consideration based on the merits"); *Murphy v. Kelly*, 259 F. Supp. 914, 917 (D. Mass. 1966) (inquiring whether removal was arbitrary or capricious), *aff'd mem.*, 368 F.2d 232 (1st Cir. 1966). But see *Vigil v. Post Office Dep't*, 406 F.2d 921, 924–25 (10th Cir. 1969) (noting that subjecting day-to-day operations of an executive agency to judicial review would be inconsistent with good administration); *Coledanchise v. Macy*, 265 F. Supp. 154, 157–58, 162 (D.S.C. 1967) (noting that the removal of federal employees because of inefficiency is beyond review by the courts and that courts should not be permitted to substitute their judgments for that of the executive branch).

280. See *Frug*, *supra* note 172, at 970–89; see also *Chaturvedi*, *supra* note 172, at 330 (noting that as of 1968 substantive limits on the removal power had "yet to gain reversal recognition" and that many courts continue to follow the doctrines of *Hennen* and *Eberlein*).

281. See *Leonard v. Douglas*, 321 F.2d 749, 751–52 (D.C. Cir. 1963).

282. PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 436 (1958).

283. See *supra* notes 175–76 and accompanying text.

284. Exec. Order No. 10,988, 3 C.F.R. 527 (1959–63). The executive order largely adopted the recommendations of a presidential task force. PRESIDENT'S TASK FORCE ON EMPLOYEE-MGMT. RELATIONS IN THE FED. SERV., *A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE* 24 (1961).

285. See Kathleen V. Buffon, Comment, *Removal for Cause from the Civil Service: The Problem of Disproportionate Discipline*, 28 AM. U. L. REV. 207, 212 (1979) (noting that the Civil Service Commission did not exercise its authority under the executive order in a way that placed substantive restrictions on the removal power).

Kennedy also made clear his belief that his power to control the executive branch extended to the independent agencies when he included them in his executive order imposing ethical standards on conflict of interest and ex parte communications.<sup>286</sup> That Kennedy believed he possessed the authority to direct the independent agencies should have come as no surprise. After he was elected, but before he had been sworn in, Kennedy asked Professor James Landis to prepare a report specifically on the independent agencies. Landis concluded, among other things, that the lack of effective inter-agency coordination was inhibiting federal policy development and required that the president possess greater influence over all agencies, including the independent agencies.<sup>287</sup> Calling the distinction between independent and executive agencies "meaningless,"<sup>288</sup> Landis recognized that the president's "constitutional duty to see that the laws are faithfully executed" was "applicable to the execution of laws entrusted to regulatory agencies, whether technically 'independent' or not."<sup>289</sup> Therefore, Landis recommended strengthening the informal controls that the president possessed over the independent agencies<sup>290</sup> as well as giving

286. Exec. Order No. 10,939, 3 C.F.R. 469 (1959-63); Redford, *supra* note 191, at 316-17.

287. STAFF OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 24-33 (Comm. Print 1960) (authored by James Landis).

288. *Id.* at 4; see also *id.* at 30 (noting that there was "not too great a difference between the allegedly 'independent' agencies and those technically a part of some Executive Department"). Landis also concluded that "[t]he relationship of the agencies to the Congress generally speaking is that of any statutory branch of the Executive to the Congress, with certain exceptions." *Id.* at 33. The so-called exceptions to which Landis pointed were not that exceptional. First, Landis stated that Congress should oversee the independent agencies, except that it should not attempt to influence their decisions in particular adjudicatory matters. *Id.* at 33-34. This caveat, however, applied with equal force to executive agencies. Second, Landis opined that the independent regulatory agencies were responsible

to the Congress rather than solely to the Executive. The policies that they are supposed to pursue are those that have been delineated by the Congress not by the Executive. Departure from these policies or the failure to make them effective or their subordination of legislative goals to the directions of the Executive is thus a matter of necessary legislative concern.

*Id.* at 34. However, all agencies, whether executive or independent, are obligated to follow the policies established by Congress and thus exceed their authority whenever their actions contravene legislative goals.

289. *Id.* at 32. In particular, "[t]he patent failure of the Federal Power Commission to execute the laws relating to natural gas production" was "rightly a matter of constitutional concern to him," as was "[t]he congestion of the dockets of the agencies, the delays incident to the disposition of cases, [and] the failure to evolve policies pursuant to basic statutory requirements." *Id.* at 32-33. As Landis later noted, "Presidential concern, with the work of the agencies, is important . . . from the standpoint of the President's duty to see that the laws are faithfully executed." *Id.* at 82.

290. The President could influence the independent regulatory commissions' execution of the law through appointments and removals (although statutes often provided that commissioners could only be removed "for cause"), Bureau of the Budget clearance of commission budget proposals and legislative proposals, and the President's power to appoint

the president greater formal authority to control the independent agencies.<sup>291</sup> That Landis would come to such a conclusion is nothing short of remarkable. One of the primary architects of the New Deal, Landis had believed that the simple tripartite form of government, wherein power is "divided neatly between legislative, executive and judicial," was inadequate to deal with modern problems and must give way to the exigencies of modern governance.<sup>292</sup>

Armed with Landis's report, Kennedy strongly asserted his control over the independent agencies. The chairmen of all of the commissions except the Federal Reserve Board submitted their resignations, and Kennedy replaced all of them except the chairman of the Federal Maritime Board.<sup>293</sup> Kennedy also sent a message to Congress on "Regulatory Agencies," calling for greater presidential oversight of the commissions.<sup>294</sup> Kennedy backed up his rhetoric by impressing upon his nominees the importance of national-policy coordination. He further expressed his hope that they would follow the declared policies of his Administration by conducting numerous policy studies and conferences to guide commission decisionmaking, and by

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the chairman of all of the commissions except the ICC and perhaps the Federal Power Commission (FPC). *Id.* at 30–31. The President could also influence commissions through less formal means, either by engaging outside consultants to conduct surveys of their affairs or by consulting with commissioners directly. *Id.* at 31–32.

291. Specifically, Landis recommended that the President be permitted to use his reorganization powers to give the chairmen of the commissions authority over all administrative matters and to make them removable at will. *Id.* at 65–66, 85; *see also id.* at 37–38 (ICC), 43–44 (Civil Aeronautics Board), 48 (Securities and Exchange Commission & FTC), 58 (FPC). The administrative matters would include the preparation and review of budget estimates, the distribution of appropriated funds, the appointment of personnel, and control over the commission's internal organization. *Id.* at 37–38, 85. Thus Landis returned to the vision that Truman had pursued in 1950, only to see it shot down by the legislative veto.

Also, recognizing that policy development required "a close and intimate relationship to the President," *id.* at 77, 80, Landis recommended that the President create separate offices within the Executive Office of the President to coordinate and develop transportation, communications, and energy policy as well as an Office for the Oversight of Regulatory Agencies charged with preparing reorganization plans specifically for the FPC, ICC, Civil Aeronautics Board, and FCC. *Id.* at 85–87. *See generally* Moreno, *supra* note 105, at 587; Redford, *supra* note 191, at 312–14; Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 697 (1989).

292. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1–2 (1938).

293. The omission of the Federal Maritime Board turned out to be insignificant since Kennedy replaced the entire membership of the Federal Maritime Board with his own appointees when he reorganized it into the Federal Maritime Commission. The plan also provided that "[e]ach Commissioner shall be removable by the President for inefficiency, neglect of duty, or malfeasance in office." Reorg. Plan No. 7 of 1961, § 102(a), 3 C.F.R. 875, 876 (1959–63).

294. Special Message to Congress on the Regulatory Agencies (Apr. 13, 1961), in 1961 PUB. PAPERS 267, 268.

requiring that the commissions send him monthly reports.<sup>295</sup> Moreover, Solicitor General Archibald Cox refused to let the FTC present its own views to the Supreme Court.<sup>296</sup> Clearly, Kennedy did not acquiesce in the supposed "independence" of the independent agencies.

Despite his tough stance regarding the independent agencies, Kennedy was more tolerant of the legislative veto than Truman or Eisenhower had been.<sup>297</sup> He even went so far as to propose that an agricultural quota and an income support program be subject to a committee veto.<sup>298</sup> As Kennedy's presidency progressed, however, he started to oppose the legislative veto. Acting on the advice of the Attorney General, Kennedy challenged the constitutionality of a provision in the Foreign Aid and Related Agencies Appropriation Act of 1963 that subjected changes in economic assistance funds administered by the Agency for International Development (AID) to a committee veto.<sup>299</sup> Kennedy charged that

this provision is unconstitutional either as a delegation to Congressional committees of powers which reside only in the Congress as a whole or as an attempt to confer executive powers on the Committee in violation of the principle of separation of powers prescribed in Articles I and II of the Constitution.<sup>300</sup>

In signing the bill despite these constitutional objections, Kennedy followed the earlier example set by Presidents Roosevelt, Truman, and Eisenhower.<sup>301</sup> Kennedy did, however, direct the Administrator of the Agency for

295. See Redford, *supra* note 191, at 314-18.

296. Brief for the United States at 10, *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961) (No. 47), *quoted in* Devins, *supra* note 159, at 270-71.

297. Kennedy failed to object to a provision subjecting reorganization plans to a one-house veto. Arms Control and Disarmament Act, Pub. L. No. 87-297, § 47, 75 Stat. 631, 638 (1961). President Kennedy also tolerated "no appropriation" provisions, *see, e.g.*, Act of Aug. 9, 1962, Pub. L. No. 87-578, 76 Stat. 335, 338; Food and Agricultural Act of 1962, Pub. L. No. 87-703, § 103, 76 Stat. 605, 608, as well as a provision requiring "consultation" before executive action, *see* Act of Oct. 11, 1962, Pub. L. No. 87-796, 76 Stat. 904, 905. Kennedy also did not register any objection to a provision requiring that the president appoint members of Congress as delegates to certain trade negotiations. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 243, 76 Stat. 872, 878; *see* Watson, *supra* note 96, at 1010 n.115, 1026.

298. Special Message to the Congress on Agriculture (Mar. 16, 1961), in 1961 PUB. PAPERS 192, 196. Even more remarkably, Kennedy endorsed private control of executive action by proposing that the agricultural controls not be put into effect until approved by a two-thirds majority of authorized farmers. *Id.* at 195. Congress did not enact the proposal. Watson, *supra* note 96, at 988 n.12, 1026 (citing HARRIS, *supra* note 110, at 205).

299. Foreign Aid and Related Agencies Appropriation Act of 1963, Pub. L. No. 87-872, 76 Stat. 1163, 1164.

300. Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance Funds (Jan. 9, 1963), in 1963 PUB. PAPERS 6.

301. *Id.*

International Development "to treat this provision as a request for information."<sup>302</sup>

Despite its brevity, the Kennedy Administration emerges as a steady defender of presidential prerogatives. Kennedy's dominance over his cabinet, his executive orders on civil rights, his claims of supervisory authority over the independent agencies, his aggressive use of foreign policy to oppose communism, and his eventual determination to oppose the legislative veto place him squarely in the unitary-executive camp. In fact, the president and his brother waged a war on organized crime that was so effective that some have speculated that it led to the president's assassination in Dallas on November 22, 1963. It is thus clear that there was no significant acquiescence in any diminution of the unitary executive on John Kennedy's watch.

#### IV. LYNDON B. JOHNSON

Anyone familiar with Lyndon Johnson's legendary personality would have little doubt that he would be a strong chief executive. That said, Johnson ascended to the presidency under extraordinarily difficult conditions, having to succeed a charismatic leader who, after having captured the imagination of the country, had died under tragic circumstances. Having sworn to continue Kennedy's vision, Johnson inherited a fully staffed executive branch to which he could not make significant changes without seeming to abandon Kennedy's legacy.<sup>303</sup> For instance, in order to associate his anti-poverty campaign with Kennedy, Johnson appointed Kennedy's brother-in-law, Sargent Shriver, as head of the War on Poverty.<sup>304</sup> In what would become typical Johnson operating procedure, when Shriver hesitated in accepting and asked for time to decide, Johnson called him and

[i]n a very low, confidential sounding voice, the President explained that he had the Cabinet with him and had to keep his voice down. "You just have to understand, Sargent, this is your President speaking, and I'm going to announce you as the head of the war against poverty. Boom," Johnson hung up. Shriver turned to his wife and said: "Looks as if I'm going to be the new head of the war against poverty."<sup>305</sup>

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302. *Id.* Curiously, the Administrator did not carry out the President's request because "the Comptroller General gave an opinion that it was in the act, unconstitutional or not, and we had to abide by it as long as it was in the act." *Foreign Assistance and Related Agencies Appropriations For 1964: Hearings on H.R. 9499 Before the Senate Comm. on Appropriations*, 88th Cong. 312-13 (1963); see Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 944 (1994); Watson, *supra* note 96, at 1026.

303. VAUGHN DAVIS BORNET, *THE PRESIDENCY OF LYNDON B. JOHNSON* 25-27 (1983).

304. ROBERT DALLEK, *FLAWED GIANT* 75 (1998).

305. *Id.* at 76.

Although Johnson was respectfully slow to make significant changes to the Administration, it would be a mistake to construe his reticence to change personnel as any hesitancy to exert full control over the workings of the executive branch. Clearly, Johnson was confident that he and he alone would determine the direction of his Administration. When Adlai Stevenson complained that he really wanted to be Secretary of State rather than an errand boy, Walter Lippman quipped, "If you are Lyndon Johnson's secretary of state, you'll be an errand boy."<sup>306</sup>

In fact, one of the foremost considerations in Johnson's appointment policy was his ability to control his subordinates. Perhaps the plainest example of this policy occurred when Johnson made his choice for a vice-presidential running mate in the 1964 election campaign. By that time it was well understood among vice-presidential potentials that "a Johnson Vice President would need to be a 'yes man' who conformed to LBJ's every wish. 'Whoever he is,' Johnson told people in 1964, 'I want his pecker . . . in my pocket.'"<sup>307</sup> When Johnson finally decided upon Hubert Humphrey, the offer was accompanied by a demand for unequivocal loyalty. The President sent instructions to Humphrey: "You can be against me in our conferences until . . . I make up my mind . . . then I want you to follow my policies."<sup>308</sup> Johnson reiterated that Humphrey must "understand that this is like a marriage with no chance of divorce. I need complete and unswerving loyalty."<sup>309</sup> The bottom line was that:

Johnson hated criticism or any challenge to his authority. Everyone who worked for him was expected to be 100 percent a Johnson man, a loyalist who, whatever his inner thoughts, would subordinate his views and ambitions to Johnson's. This is not to say that Johnson wanted only ciphers around him. To the contrary, he valued having the services of "the best and the brightest." But at the same time, he wanted them to bend the knee, to take a back seat, to subordinate themselves to the President . . . "I want people around me," Johnson said repeatedly, "who would kiss my ass on a hot summer's day and say it smells like roses."<sup>310</sup>

Johnson's biographer, Vaughn Davis Bornet, reports that while "Hubert Humphrey talked to the President at length upon occasion, he could not count on prevailing," and neither could anyone else.<sup>311</sup> Bornet adds that, during his years in office, President Johnson ran the executive branch and—after listening to much advice—made thousands of final decisions himself,

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306. BORNET, *supra* note 303, at 25.

307. DALLEK, *supra* note 304, at 138.

308. *Id.* at 158.

309. *Id.* at 159.

310. *Id.* at 160.

311. BORNET, *supra* note 303, at 42.

while delegating masses of detail in administration to those whom he fully trusted. "Together, the eager president and his ambitious team in the executive branch dominated the federal government from 1963 to 1969."<sup>312</sup>

As another example of Johnson's insistence on fierce loyalty from subordinates, when it came time to appoint a head to his Cabinet Department of Housing and Urban Development, everyone expected that Johnson would appoint Robert Weaver, administrator of the Housing and Home Finance Agency, as the first black Cabinet member.<sup>313</sup> Before giving him the post, however, Joseph Califano, who was one of Johnson's closest aides, remembered how Johnson

made it clear he could break or make Weaver—by doing both. He gave me a glimpse of the trait that sometimes drove him to crush and reshape a man before placing him in a job of enormous importance, much the way a ranch hand tames a wild horse before mounting it. To Johnson, this technique helped assure that an appointee was his alone.<sup>314</sup>

And when it became clear that he did not "own" his subordinates, Johnson dismissed them forthwith, as in the case of Robert MacNamara, who made the mistake of disagreeing with the President's policy in Vietnam.<sup>315</sup>

Johnson was a workaholic who wanted "to outdo his predecessors in the field of foreign affairs"; Bornet reports that Johnson counted every meeting he had had with a foreign head of state compared with his four predecessors and was pleased that he far exceeded them, particularly in meetings held outside the United States.<sup>316</sup> Johnson was also very aware "that his was the finger on the button" for starting a nuclear war, and he insisted "that the buck would "stop with him on matters involving central war or peace."<sup>317</sup>

Johnson micro-managed law execution in a way that certainly asserted presidential power, but that would be seen as offensive today. For example, Bornet reports:

When an FBI agent hesitated to check the phone records of the Republican vice-presidential candidate, Spiro Agnew, Johnson himself "came on the phone and proceeded to remind [the agent] that he was commander in chief and he should get what he wanted." Johnson aides used presidential powers to push agents to check on matters they thought promising.<sup>318</sup>

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312. *Id.* at 43.

313. DALLEK, *supra* note 304, at 288.

314. *Id.* at 229 (quoting Joe Califano).

315. *Id.* at 494-95.

316. BORNET, *supra* note 303, at 191.

317. *Id.* at 196-97.

318. *Id.* at 207-08.



Bornet adds that "President Johnson was a person who inhaled every detail of the national budget, kept track of the votes and predilections of even the most obscure congressman, and had time to find out many obscure things."<sup>319</sup> He was certainly aware of the extra-legal surveillance activities of the FBI, and he "knew about the secret taping of phone conversations "in the Oval Office, for it was done by a secretary on his signal. . . . National safety and, sometimes, personal power were placed above the Constitution and the law in those years."<sup>320</sup>

Notwithstanding Johnson's great attention to details, the administration of many of the programs in his war on poverty was surprisingly poor.<sup>321</sup> Bornet reports that the "administration of the [Office of Economic Opportunity] proved to be a nightmare" and that "[a]nti-poverty programs became political pork-barrel-type programs and were taken over by sophisticated middle-class bureaucrats." These administrative problems were made more significant because the total number of federal employees increased from 1,100,000 in 1963 to 1,300,000 in 1969, and two new cabinet departments, Housing and Urban Development and Transportation, were added during the Johnson years.<sup>322</sup>

The cumulative effect of Great Society legislation was to produce far greater problems of executive structure and coordination than had existed at any other time, except perhaps during the Civil War, the Great Depression, and World War II. The problems were permanent, [experts assert] "threatening the capacity of the administrative system to fulfill policy objectives."<sup>323</sup>

The Johnson years were also marked by the assassinations of Malcolm X, Martin Luther King, Jr., and Robert Kennedy, as well as many other threats to the faithful execution of federal laws. Bornet observes that Johnson was surprisingly lax in his law-execution efforts in response to some of these threats, in part because of the liberal outlook of his Attorneys General. Bornet states:

Riots, mass demonstrations, and defiance of the federal government's authority to draft youths for military service combined to make law enforcement difficult. Johnson accepted the burden with marked reluctance, given his public emphasis on positive factors. His attorney generals [sic] knew that the law of the land had to be enforced, but they hoped that, somehow,

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319. *Id.* at 208.

320. *Id.*

321. *Id.* at 220.

322. *Id.* at 243.

323. *Id.* (quoting JAMES T. BENNET & MANUEL H. JOHNSON, *THE POLITICAL ECONOMY OF FEDERAL GOVERNMENT GROWTH, 1959-1978*, at 29-33 (1980)).

expenditures on education, money for better food and housing, and a multitude of services would keep crime from growing.<sup>324</sup>

This laxity in law enforcement was surprising because in all other respects, during the Johnson years, "the executive branch . . . developed, in the hands of this leader and his associates, into a dynamic administrative unit never likely to be equaled."<sup>325</sup>

Johnson also strongly resisted attempts by Congress to limit his authority to administer the laws. For example, Congress passed a bill in 1966 that purported to restrict the President's authority to propose a financial plan for agricultural research for fiscal year 1968.<sup>326</sup> Johnson indicated that he would ignore the provision as an improper infringement upon executive power by stating:

The provision thus clearly intrudes upon the Executive function of preparing the annual budget. In developing the budget for fiscal 1968, I will give careful consideration to the view of Congress expressed in this act—but I will propose an agricultural research program designed and financed to make the best possible use of the resources available to us.<sup>327</sup>

Two months later, after the Secretary of Commerce exercised his authority under a previously enacted statute to impose export controls on leather and cattle hides, Congress attached a rider to the Commerce Department's appropriations bill prohibiting the Department from using any appropriated funds to enforce the export controls.<sup>328</sup> Johnson complained that "in this rider . . . Congress attempts to control the manner in which the Export Control Act is to be administered."<sup>329</sup> These objections notwithstanding, Johnson signed the bill; foreign demand for hides had fallen to the point where the Secretary was planning on dropping the controls anyway. However, since conditions might again require the imposition of export controls on leather, Johnson directed the Secretary of Commerce and the Director of the Budget to submit legislation removing this restriction.<sup>330</sup>

The following year, Johnson objected that three provisions of the Military Construction Authorization Act of 1968<sup>331</sup> were "inconsistent with

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324. *Id.* at 247–48.

325. *Id.* at 351.

326. Department of Agriculture and Related Agencies Appropriation Act, Pub. L. No. 89-556, 80 Stat. 689, 690 (1966) (codified as amended at 7 U.S.C. § 612c (2002)).

327. Statement by the President Upon Signing the Department of Agriculture and Related Agencies Appropriation Bill (Sept. 8, 1966), in 1966 PUB. PAPERS 980, 981.

328. Act of Nov. 8, 1966, Pub. L. No. 89-797, § 304, 80 Stat. 1479, 1497.

329. Statement by the President Expressing Disapproval of Appropriation Act Provision Relating to Export Control of Hides, Skins, and Leather (Nov. 8, 1966), in 1966 PUB. PAPERS 1351, 1351.

330. *Id.*

331. Pub. L. No. 90-110, 81 Stat. 279.

the sound management of America's military establishment and raise questions concerning the constitutional separation of powers."<sup>332</sup> In these provisions, the Act prohibited Johnson from closing the Naval Academy's dairy farm,<sup>333</sup> froze the present geographic boundaries and headquarters of the eleven Naval Districts,<sup>334</sup> and prohibited the Department of the Army from closing a particular installation in Hawaii.<sup>335</sup> Johnson's signing statement dripped with sarcasm when he quipped, "Thus the Congress, which has given the Navy Department authority over the world's most powerful fleet, has withdrawn the Department's authority over 380 cows."<sup>336</sup> In the end, however, the dairy remained open.<sup>337</sup>

Johnson also issued more general directives to the executive officers, for example ordering them to continue the antidiscrimination and affirmative-action programs begun during the Kennedy Administration.<sup>338</sup> Like Kennedy, Johnson did not rely upon his defense or procurement powers as the basis for his actions, nor did he rely upon the newly enacted Civil Rights Act of 1964. Instead, Johnson followed Kennedy's example and simply invoked "the authority vested in [him] as President of the United States by the Constitution and statutes of the United States."<sup>339</sup> Courts and commentators have struggled to determine whether Johnson issued the order pursuant to statutory authority or under his implied powers as president.<sup>340</sup>

332. Statement by the President Upon Signing the Military Construction Authorization Act, 1968 (Oct. 21, 1967), in 1967 PUB. PAPERS 935, 935.

333. § 810(a), 81 Stat. at 309.

334. § 1001, 81 Stat. at 310.

335. § 809, 81 Stat. at 309.

336. Statement by the President Upon Signing the Military Construction Authorization Act, *supra* note 332, at 935.

337. May, *supra* note 302, at 943-44.

338. See *supra* notes 271-75 and accompanying text.

339. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965). This order expanded the Kennedy Administration's program in two significant ways. First, it applied the antidiscrimination prohibitions to all of a contractor's activities during the performance of the contract, not just those activities connected with the contract. Second, it expanded the program to include sex discrimination. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965). See generally James L. Moeller, Comment, *Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination*, 43 MO. L. REV. 451, 456-61 (1978).

340. As noted earlier, the jurisdictional basis of the nondiscrimination executive orders has traditionally been construed as resting on the executive power vested in the President by Article II. See *supra* notes 122-24, 273-74 and accompanying text; *Contractors Ass'n v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971) (holding that even if not statutorily authorized, Executive Order No. 11,246 falls within the president's implied authority to act in the absence of a contrary statute). Some courts nonetheless persisted in viewing Executive Order 11,246 as being based on the procurement statute. *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 466-67 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978); *N.E. Constr. Co. v. Romney*, 485 F.2d 752, 760-61 (D.C. Cir. 1973); *Contractors Ass'n*, 442 F.2d at 171; *Legal Aid Soc'y v. Brennan*, 381 F. Supp. 125, 130 (N.D. Cal. 1974); *United States v. Papermakers*

Johnson also pioneered what would emerge as a critical device in allowing the president to control the execution of the law when he began using the oversight responsibilities of the Bureau of the Budget to influence the development of important agency regulations.<sup>341</sup> Thus Johnson plainly had little doubt about his authority to control the execution of the laws. It is symptomatic of Johnson's views that he "pocket vetoed a bill creating an independent maritime administration, and thus the Maritime Administration remained in the Department of Commerce."<sup>342</sup>

Johnson exerted his influence over the independent agencies as well. When he met with the heads of the commissions shortly after taking office, his remarks indicated a broad view of presidential responsibility and left little doubt that presidential intervention would be forthcoming if and when the commissions failed to discharge their responsibilities in a manner consistent with the President's policies.<sup>343</sup> Consistent with this vision, Johnson directed the heads of three commissions involved in the regulation of transportation to begin intra-agency consultations on their problems. A

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Local 189, 282 F. Supp. 39, 43 (E.D. La. 1968); *Weiner v. Cuyahoga Cmty. Coll. Dist.*, 249 N.E.2d 907, 909-10 (Ohio 1969). *But see* *Cramer v. Va. Commonwealth Univ.*, 415 F. Supp. 673, 680 (E.D. Va. 1976) (holding that the order was foreclosed by statute); Blumstein, *supra* note 124, at 927-32, 939-49 (arguing that the order is not justified either by the Constitution or by statute); Moeller, *supra* note 338, at 479-87 (same); Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 733 (1972). *See generally* James A. Hardgrove, Note, *The Philadelphia Plan*, 45 NOTRE DAME L. REV. 678, 685-88 (1970); Note, *supra* note 124, at 383.

Enactment of the Civil Rights Act of 1964 raised a whole new round of questions about the propriety of these executive orders. Opponents of the executive order argued that in passing Title VII of the Act, Congress had explicitly prohibited the use of quotas and that policy preempted the President's authority and that the House's failure to pass an amendment explicitly authorizing the executive antidiscrimination program suggested that it was unauthorized. The order's supporters pointed out that the Senate's failure to pass an amendment that would have explicitly provided that Title VII constituted the exclusive remedy for discrimination bolstered the imposition of additional antidiscrimination protection. *See, e.g.*, James E. Jones, Jr., *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 388-94; Earl M. Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 102-09 (1970); Blumstein, *supra* note 124, at 939-49; Hardgrove, *supra*, at 687-95; Moeller, *supra* note 338, at 482-87; Schuwerk, *supra*, at 733-38; Karen Ann Sindelar, Note, *Employment Discrimination—Weber v. Kaiser Aluminum & Chemical Corp.: Does Title VII Limit Executive Order 11246?*, 57 N.C. L. REV. 695, 699-714 (1979); Note, *The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades*, 6 COLUM. J.L. & SOC. PROBS. 187, 224-29 (1970); Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U. L. REV. 590, 596-600 (1969). Regardless of how this controversy is resolved, Johnson's actions clearly indicate that he believed he had the authority to direct the manner in which the subordinate executive officers executed the laws.

341. Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 9 (1984).

342. LEWIS, *supra* note 34, at 34.

343. Remarks at a Meeting with the Heads of Independent Regulatory Agencies (Dec. 3, 1963), in 1963-64 PUB. PAPERS 18.

Bureau of the Budget circular also established guidelines on the responsibilities of the Federal Power Commission (FPC) and other executive agencies in the acquisition of water data.<sup>344</sup> Additionally, "Johnson, ever the New Dealer faithful to the conviction that consolidation of control in the executive assured greater economy and efficiency, intended to create a Department of Transportation responsible for all phases of national mobility and safety."<sup>345</sup> And in an attempt to make the nation's cities more habitable, Johnson created the Cabinet Department of Housing and Urban Development.<sup>346</sup> Johnson also severely cut NASA's budget,<sup>347</sup> and made sure to have "Johnson men" in the State Department "to be sure those damned fools didn't do something stupid."<sup>348</sup>

Furthermore, Johnson ardently opposed the legislative veto as an unconstitutional infringement on the unitary executive. Rather than vetoing bills with legislative vetoes embedded in them, Johnson tended to use signing statements to construe the legislation in a manner that preserved its constitutionality. For example, within the first few weeks of his Administration, Johnson criticized a provision of the Public Works Appropriation Act that prohibited the Panama Canal Company from disposing of any real property without obtaining the prior approval of congressional committees.<sup>349</sup> Condemning the committee veto as either "an unconstitutional delegation to Congressional committees of powers which reside only in the Congress as a whole, or an attempt to confer executive powers on the committees in violation of the principle of separation of powers set forth in the Constitution," Johnson directed the Secretary of the Army to treat the provision as a request for information rather than a formal committee veto.<sup>350</sup> Similar signing statements followed.<sup>351</sup>

344. Circular No. A-67 (Bur. of Budget Aug. 28, 1964) (on file with the Iowa Law Review). See generally Redford, *supra* note 191, at 318-19.

345. DALLEK, *supra* note 304, at 313.

346. *Id.* at 228.

347. *Id.* at 423.

348. *Id.* at 144 (quoting Michael V. Forrestal, NSC member).

349. Pub. L. No. 88-257, 77 Stat. 844, 847 (1963).

350. Statement by the President Upon Approving the Public Works Appropriations Act (Dec. 31, 1963), in 1963-64 PUB. PAPERS 104, 104 & n.1.

351. In signing the Agricultural Trade Development and Assistance Act of 1964, Pub. L. No. 88-638, 78 Stat. 1035, Johnson objected to two legislative veto provisions. One provision

seeks to give either the House Committee on Agriculture and Forestry a veto power over certain proposed dispositions of foreign currencies accruing from sales under Public Law 480. The other seeks to prevent the President from making certain loans at interest rates below a specified level unless he has concurrence of an advisory committee composed in part of Members of Congress and in a part of his own executive appointees.

Statement by the President Upon Signing Bill Extending the Agricultural Trade and Assistance Act (Oct. 8, 1964), in 1963-64 PUB. PAPERS 1249, 1250. Since "[b]oth such provisions

Johnson's opposition to legislative vetoes was so strong that he refused to accept provisions first enacted during the Eisenhower Administration that prohibited Congress from appropriating funds for particular uses unless a particular committee had given its prior approval, on the grounds that they were the functional equivalents of legislative vetoes.<sup>352</sup> When confronted with such a provision in the Water Resources Research Act of 1964,<sup>353</sup> Johnson directed the Secretary of the Interior not to request any funds under the Act. Although Johnson acknowledged that such provisions were technically constitutional, he still objected to them in principle and refused to implement the Act until Congress eventually amended the legislation to remove the committee approval provision.<sup>354</sup> Johnson later went so far as to veto legislation containing such a provision, concluding that such committee approval "seriously violates the spirit of the division of powers between the legislative and executive branches" and "infringes upon the responsibilities of the executive branch."<sup>355</sup> As Johnson reasoned, "[t]he executive branch is given, by the Constitution, the responsibility to implement all laws—a specific and exclusive responsibility which cannot be shared with a committee of Congress." Johnson accordingly withheld his approval from the bill until the offending provision was removed.<sup>356</sup> Johnson entered similar objections throughout the balance of his Administration.<sup>357</sup>

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represent[ed] a clear violation of the constitutional principle of separation of powers," Johnson directed executive officials to keep Congress informed and consult with them on all aspects of the law. *Id.*

Later that same month, Johnson signed legislation requiring that the rules and regulations prescribed by the Director of Central Intelligence for the establishment and maintenance of the retirement system were not to take effect until approved by the chairmen and ranking minority members of the Armed Services Committees. Central Intelligence Agency Retirement Act of 1964, Pub. L. No. 88-643, 78 Stat. 1043, 1043. Johnson noted that "[s]uch a provision attempts to confer executive powers on the members of the legislative branch, in violation of the constitutional principle of separation of powers." Statement by the President Upon Approving Bill Authorizing a Retirement System for Certain Employees of the Central Intelligence Agency (Oct. 14, 1964), in 1963-64 PUB. PAPERS 1336, 1336. Accordingly, Johnson instructed the Director to "treat the provision as a request for consultation with the named committee members." *Id.* See generally Watson, *supra* note 96, at 1026-27.

352. Since Congress is free to establish its own rules of procedure, and these provisions only served to limit the discretion of Congress before it enacted legislation while not limiting the discretion of the executive branch after legislation had been enacted, Eisenhower had accepted such provisions as constitutional.

353. Pub. L. No. 88-379, § 200, 78 Stat. 329, 331.

354. Statement by the President Upon Signing the Water Resources Research Act (July 17, 1964), in 1963-64 PUB. PAPERS 861, 862. The provision was deleted by the Act of Apr. 19, 1966, Pub. L. No. 89-404, 80 Stat. 129. See also May, *supra* note 302, at 939-40; Watson, *supra* note 96, at 1027.

355. Lyndon B. Johnson, Veto Message (June 5, 1965), reprinted in 111 CONG. REC. 12,639 (1965).

356. *Id.*

357. Four months later, Johnson objected to a committee-approval provision in the Omnibus Rivers and Harbors Act, Pub. L. No. 89-298, § 201(a), 79 Stat. 1073, 1073 (1965),

Finally, Johnson even objected to the one type of provision that every previous president had agreed was constitutional: the "report and wait" provision. Although Johnson indicated that he would accept a "reasonable 30-day period of notification" to congressional committees, the proposed Military Construction Act required that the administration wait 120 days. Although again not technically unconstitutional, Johnson nonetheless vetoed the bill, condemning it as "repugnant to the Constitution" and "a fundamental encroachment on one of the great principles of the American Constitutional system—the separation of powers between the Legislative and Executive branches."<sup>358</sup> Johnson continued: "By the Constitution, the executive power is vested in the President . . . [The President] cannot sign into law a bill which substantially inhibits him from performing his duty."<sup>359</sup> As a result, Johnson concluded that "[t]he limitations upon . . . the executive branch of the government here sought to be imposed are a clear violation of separation of powers . . . . The Congress enacts the laws. Their execution must be left to the President."<sup>360</sup> It is "the President [who] is responsible . . . for the faithful execution of the laws enacted by Congress."<sup>361</sup> Johnson supported his conclusion by quoting James Madison's statement during the Decision of 1789 and by noting that "Attorneys General in unbroken succession since at least the time of President Wilson" had opposed the use of such legislative vetoes.<sup>362</sup> Johnson eventually signed

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concluding that acceding to such a provision "would make the President a partner in the abdication of a fundamental principle of our Government—the separation of powers prescribed by the United States Constitution," which "would dilute and diminish the authority and powers of the Presidency." Statement by the President Upon Signing the Omnibus Rivers and Harbors Act (Oct. 26, 1965), in 1965 PUB. PAPERS 1082, 1082–83. Unlike the previous provision, the provision contained in this legislation was optional rather than obligatory. Because nothing in the Act prevented Johnson from signing it and then directing his Administration not to exercise the authority provided by the Act until the provision was removed, Johnson concluded that the better course would be to sign the bill so that the remaining legislative provisions could be enacted. *Id.* at 1083; see also May, *supra* note 302, at 939; Watson, *supra* note 96, at 1027–28.

The following year, Johnson criticized a provision that prohibited Congress from appropriating funds for rural-renewal loans unless that loan had been approved by the Agriculture Committees. Act of Nov. 8, 1966, Pub. L. No. 89-796, 80 Stat. 1478 (amending the Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 102(c), 76 Stat. 605, 608). Johnson called such provisions "repugnant to the Constitution. They represent an improper encroachment by the Congress and its committees upon executive responsibilities, and dilute and diminish the authority and powers of the Presidency." Statement by the President Upon Signing Bill Amending the Bankhead-Jones Farm Tenant Act (Nov. 8, 1966), in 1966 PUB. PAPERS 1354, 1354. Therefore, Johnson directed the appropriate Departments to submit corrective legislation and ordered his Administration not to approve any loans which would require committee approval. *Id.*

358. Veto of the Military Authorization Bill (Aug. 21, 1965), in 1965 PUB. PAPERS 907, 907.

359. *Id.*

360. *Id.*

361. *Id.* at 908.

362. *Id.*

corresponding legislation that contained a more modest, thirty-day waiting period.<sup>363</sup> However, Johnson again objected when Congress attempted to extend the waiting period to thirty days of continuous congressional session.<sup>364</sup> Johnson expressed his doubts as to whether such a waiting period was reasonable and warned that his "responsibilities as President and Commander in Chief will require [him] to seek prompt revision of the restriction if future circumstances prove it to be inimical to the national interest."<sup>365</sup>

Thus Johnson opposed the legislative veto more vehemently than any other previous president. Moreover, Johnson consistently objected to congressional efforts to encroach upon his authority and he resolutely asserted his control over all parts of the executive branch. The conclusion thus becomes inescapable that there was no acquiescence in any diminution of the unitary executive during Lyndon Johnson's presidency.

#### V. RICHARD M. NIXON

Richard M. Nixon came to the presidency with a deep admiration for the system of cabinet governance that he thought had prevailed during the Eisenhower Administration. His initial plan was to let department heads run their programs quite independently while he concentrated on foreign policy.<sup>366</sup> But, during his five-year tenure in office, he appointed thirty cabinet heads, breaking the old record held by Ulysses S. Grant, and the median length of tenure of cabinet secretaries fell from forty months to eighteen.<sup>367</sup> Nixon was not afraid to make removals, as the frequent turnover in his cabinet secretaries illustrates. Indeed, he began his second term by asking for the resignations of all his cabinet secretaries so that he could decide which ones to retain.<sup>368</sup> He noted in doing this that once a cabinet official has been in place for a while, the bureaucracy starts to run him instead of the other way around.<sup>369</sup>

As early as the middle of 1969, Nixon "had begun to rethink his approach to the cabinet,"<sup>370</sup> and "[a]s the White House weakened the power of the departments, Nixon's chief of staff became more important."<sup>371</sup> H.R.

363. Military Construction Authorization Act, Pub. L. No. 89-188, 79 Stat. 793, 818 (1965); Statement by the President Upon Signing the Military Construction Authorization Act (Sept. 16, 1965), in 1965 PUB. PAPERS 1003; see also Watson, *supra* note 96, at 1028.

364. Military Construction Authorization Act, Pub. L. No. 89-568, § 613(2), 80 Stat. 739, 757 (1966).

365. Statement by the President Upon Signing the Military Construction Authorization Bill (Sept. 12, 1966), in 1966 PUB. PAPERS 1008, 1008.

366. MELVIN SMALL, THE PRESIDENCY OF RICHARD NIXON 37 (1999).

367. *Id.* at 40.

368. *Id.* at 269.

369. *Id.* at 270.

370. *Id.* at 41.

371. SMALL, *supra* note 366, at 42.



Haldeman, Nixon's first chief of staff, became Nixon's buffer, and anyone who wanted to see Nixon had to go through Haldeman to talk to the President, which Nixon later conceded was a mistake.<sup>372</sup> Alexander Haig, who ultimately replaced Haldeman as chief of staff, functioned much the same way with Nixon praising him as "the meanest, toughest, most ambitious son of a bitch I ever knew."<sup>373</sup>

Notwithstanding the many troubles that would eventually come to engulf his Administration, Richard Nixon proved to be a stalwart defender of the president's authority to execute the laws.<sup>374</sup> For example, Nixon protected the president's removal power when he successfully resisted Congress's attempt to remove his OMB Director, Roy Ash, and his Deputy OMB Director, Fred Malek, by abolishing their positions and reestablishing them subject to Senate confirmation.<sup>375</sup> Nixon complained that "[t]his legislation would require the forced removal by an unconstitutional procedure of two officers now serving in the executive branch."<sup>376</sup> The president's "power and authority to remove, or retain, executive officers" was "deeply rooted in our system of government."<sup>377</sup> Although Nixon did "not dispute Congressional authority to abolish an office or to specify appropriate standards by which the officers may serve," Nixon vetoed the bill because "the power of the Congress to terminate an office cannot be used as a back-door method of circumventing the president's power to remove."<sup>378</sup> Nixon eventually prevailed in his defense of the removal power when, after failing to override Nixon's veto,<sup>379</sup> Congress amended the legislation the next year to require Senate confirmation only of future OMB Directors and Deputy Directors.<sup>380</sup>

A major administrative change that Nixon ushered in was the transformation of the Bureau of the Budget, created under President Harding and moved to the White House by FDR, into the modern, more

372. *Id.* at 42–43.

373. *Id.* at 45.

374. See Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 401 (1989) ("The Nixon years were characterized by aggressive assertions of presidential power vis-a-vis Congress . . .").

375. Congress's efforts were similar to the efforts during the Truman Administration to remove officials in the Bureau of Reclamation by changing the qualifications for their offices. See *supra* notes 80–85 and accompanying text.

376. Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and Budget (May 18, 1973), in 1973 PUB. PAPERS 539, 539.

377. *Id.*

378. *Id.* Nixon closed by quoting James Madison's ringing endorsement of the separation of powers in the Decision of 1789. *Id.* at 540 (quoting 1 ANNALS OF CONG. 581 (1789)).

379. Although the Senate voted 62–22 to override the veto, 119 CONG. REC. 16,507 (1973), the House failed to follow suit, voting 236–178 to sustain the veto, *id.* at 16,773.

380. Act of Mar. 2, 1974, Pub. L. No. 93-250, 88 Stat. 11; see LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 78 (3d ed. rev., 1991) [hereinafter FISHER, CONSTITUTIONAL CONFLICTS]; LOUIS FISHER, PRESIDENTIAL SPENDING POWER 51–55 (1975).

powerful Office of Management and Budget. Nixon's biographer, Melvin Small, describes this change as meaning that "[i]nstead of just clearing all budgets except for those of the Central Intelligence Agency and Defense before they were sent to Congress, the OMB would be concerned with policy and operations management. This was another way for the White House to exert more control over the departments."<sup>381</sup> This was a crucial step in reinforcing the unitary executive because the power of OMB could be centrally harnessed by the president to bring recalcitrant cabinet departments and agencies into line. Political scientist David Lewis notes that "[t]he Office of Management and Budget . . . is also a source of presidential institutional memory. The OMB has historically sought to increase presidential influence and control. It is the locus of administrative management in the executive establishment."<sup>382</sup> In fact, during his second term, Nixon had hoped to expand the management authority of OMB,<sup>383</sup> but he was soon overwhelmed by the Watergate scandal.

Nixon began his efforts to assert control over the executive branch by expanding the program of White House oversight of regulatory policy begun during the Johnson Administration.<sup>384</sup> Nixon's program was initially restricted to the Environmental Protection Agency (EPA), which Nixon created by executive order in 1970 and the regulations of which he sought to subordinate to OMB's centralized clearance.<sup>385</sup> The Nixon oversight program began on May 21, 1971, when OMB Director George Shultz sent a memorandum to EPA Administrator William Ruckelshaus requiring OMB cost-benefit clearance for all EPA decisions that were expected to have a significant impact on the policies of other agencies, impose significant costs on non-federal sectors, or "create additional demands on the federal budget."<sup>386</sup> Nixon later expanded this initiative into a larger program termed "Quality of Life" review,<sup>387</sup> which required agencies to submit covered

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381. SMALL, *supra* note 366, at 49-50.

382. LEWIS, *supra* note 34, at 71.

383. SMALL, *supra* note 366, at 271.

384. See *supra* note 341 and accompanying text.

385. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970), *reprinted in* 42 U.S.C. § 4321 (1994), *and in* 84 Stat. 2086 (1970).

386. Letter from OMB Director George P. Shultz, to EPA Administrator William D. Ruckelshaus (May 21, 1971), *quoted in* 2 NAT'L RESEARCH COUNCIL, DECISION MAKING IN THE ENVIRONMENTAL PROTECTION AGENCY 86 (1977).

387. Memorandum from George P. Shultz, Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and Public Health and Safety (Oct. 5, 1971), *cited in* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Autumn 1991, at 127, 128 n.4. For general descriptions of Quality of Life Review, see Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 221 (1993); Moreno, *supra* note 105, at 488-89; James T. O'Reilly & Phyllis E. Brown, *In Search of Excellence: A Prescription for the Future of OMB Oversight of Rules*, 39 ADMIN. L. REV. 421, 424-25 (1987); Percival, *supra*, at 133-38; Caroline DeWitt, Comment, *The President's Council on Competitiveness*:

regulations thirty days before draft publication, along with an analysis of the rule's objectives, alternatives, and expected costs and benefits. OMB then solicited comments from other agencies, which were forwarded to the agency proposing the rule. A similar process, focusing on public comments and new issues raised during the rulemaking, was required twenty days before the publication of final rules.

Although the program was nominally extended to all federal policy proposals involving consumer protection, public health and safety, and occupational health and safety, in practice, EPA remained the only agency routinely required to submit its proposals to OMB.<sup>388</sup> In addition, OMB theoretically only facilitated inter-agency comments and mediated inter-agency conflicts; the issuing agency ostensibly retained control over the final decision. In practice, OMB was able to use Quality of Life review to effect significant changes in EPA policy.<sup>389</sup> Nixon further strengthened his control over regulatory policy on July 31, 1972, when OMB Circular A-19 required that agencies "submit proposed testimony, reports, or legislation to OMB prior to their transmission to Congress."<sup>390</sup>

The extent to which Nixon centralized administrative control in OMB is underscored by the fact that leading EPA administrators were unable to obtain written assurances that they retained independent decisional authority.<sup>391</sup> It is true that these administrators sometimes threatened to resign over their inability to obtain assurances that they would have the final say over EPA regulations.<sup>392</sup> Such threats are properly regarded as being consistent with the unitary executive, rather than evidence of agency independence as some have suggested,<sup>393</sup> since resignation or removal is the natural outcome under our theory when an executive official finds himself or herself out of step with administration policy.

Nixon extended the policy initiated by Kennedy of extending the civil service protection enjoyed by veterans to all federal employees. A pair of executive orders giving nonveterans the right to appeal adverse employment

*Undermining the Administrative Procedure Act with Regulatory Review*, 6 ADMIN. L.J. AM. U. 759, 769-70 (1993).

388. But see Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 466 (1978) (describing OMB intervention in NHTSA rulemaking).

389. Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 988-89 (2001).

390. Percival, *supra* note 387, at 137.

391. Percival, *supra* note 389, at 989 n.154 (citing JOHN QUARLES, *CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY* 119 (1976)).

392. See *id.* at 988-89 (citing *Implementation of the Clean Air Act Amendment of 1970—Part I: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong. 325 (1972) (statement of EPA Administrator William Ruckelshaus), and QUARLES, *supra* note 391, at 119).

393. See *id.*

actions to the Civil Service Commission<sup>394</sup> and revoking the agency review process established by Kennedy in favor of exclusive review by the Civil Service Commission<sup>395</sup> in effect extended the procedural protections of the Veterans' Preference Act of 1944 to all federal employees, veterans and nonveterans alike. This action is fully consistent with the unitary executive because, as we have noted, the procedural protections were not construed as placing any limits on the president's unfettered power to remove.<sup>396</sup> In addition, the fact that the president had the power to remove Civil Service Commissioners at will<sup>397</sup> rendered any authority wielded by the Commission unproblematic from the standpoint of the unitary executive.

That said, we acknowledge that the Nixon Administration did bear witness to the emergence of the first real limits on the president's removal power over the civil service. Interestingly, the threat to presidential power came not from Congress, but rather from the courts. The Supreme Court began to recognize that the civil service laws gave federal employees a sufficient property interest in their jobs to give them the benefit of procedural due process protections when fired.<sup>398</sup> And, even then, such noted commentators as Gerald Frug criticized the Court's decisions as starkly ahistorical and inconsistent with the longstanding, judicially recognized tradition of unfettered presidential removal.<sup>399</sup> In any event, contrary to popular belief, the idea that the civil service laws limit the president's power to remove is of fairly recent vintage dating back only to 1974. Given the Court's acknowledgement in *INS v. Chadha*<sup>400</sup> that the fact that presidents since the Wilson Administration had consistently opposed a particular practice was sufficient to keep a question open as a constitutional matter, it is hard to see how this development could turn the civil service laws into an established derogation of the unitariness of the executive branch.

Nixon also asserted his authority to direct federal officials' execution of the laws. As one example of this, Nixon continued the program initiated by Johnson's executive order requiring that government contractors institute affirmative action plans.<sup>401</sup> Invoking the President's authority under the

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394. Exec. Order No. 11,491, § 22, 3 C.F.R. 191, 204 (1971), *reprinted in* 5 U.S.C. § 7101.

395. Exec. Order No. 11,787, 3 C.F.R. 876 (1971-1975).

396. See *supra* notes 172-80, 278-85 and accompanying text.

397. See Calabresi & Yoo, *supra* note 20, at 788; Frug, *supra* note 172, at 955.

398. See *Arnett v. Kennedy*, 416 U.S. 134, 151 (1974). *Arnett* followed from the Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), regarding the dismissal of state employees. *Id.*

399. Frug, *supra* note 172, at 977-89. As Professor Frug notes, both *Roth* and *Sindermann* involved teachers who alleged that they were removed for their exercise of their constitutional right to free speech. As a result, these cases could have been resolved under *Wieman* and *Pickering* without resorting to judicial innovation. *Id.* at 977-78.

400. 462 U.S. 919, 942 n.13 (1983).

401. See *supra* note 338 and accompanying text.

Constitution and the statutes of the United States, Nixon issued an executive order declaring a federal policy of nondiscrimination in federal employment and ordering every agency to institute an affirmative action program.<sup>402</sup> The Comptroller General issued a series of opinions suggesting that the order was unenforceable because it did not spell out the minimum requirements of a satisfactory affirmative action program.<sup>403</sup> In response, Secretary of Labor George Shultz issued a revised version known as the Philadelphia Plan that gave more specific guidance on what was required.<sup>404</sup> After the Comptroller General ruled that the additional guidance provided by the Philadelphia Plan imposed quotas in violation of Title VII of the Civil Rights Act of 1964,<sup>405</sup> Attorney General John Mitchell issued an opinion clarifying that the Plan involved mere goals, not quotas,<sup>406</sup> an opinion that Shultz accepted.<sup>407</sup> Finally, after a complicated series of legislative maneuvers, Congress ended future questions about the Philadelphia Plan's legitimacy in 1972 by unequivocally approving the President's authority to mandate affirmative action programs.<sup>408</sup> But until that point, Nixon, like Kennedy and Johnson before him, had derived the authority to require executive branch affirmative action programs directly from his authority to control the execution of federal law.

Nixon also undertook efforts to dominate the independent agencies. Nixon's efforts were based on the conclusion of the Advisory Council on Executive Organization (commonly known as the "Ash Council" after its

402. Exec. Order No. 11,478, §§ 1-2, 3 C.F.R. 133, 134 (1969).

403. See, e.g., Ernst-Theodore Arndt, 52 Comp. Gen. 145 (1972); Alton Box Bd. Co., 51 Comp. Gen. 551 (1972); Sher and Harris, 50 Comp. Gen. 844 (1971); Apache Flooring Co., 50 Comp. Gen. 627 (1971); Sec'y of Labor, 49 Comp. Gen. 59 (1969); Rep. William C. Cramer, 48 Comp. Gen. 326 (1968); Rep. William C. Cramer, 47 Comp. Gen. 666 (1968).

404. See *Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159, 165 (3d Cir. 1971).

405. 49 Comp. Gen. 59 (1969).

406. 42 Op. Att'y Gen. 405 (1969); Office of the Solicitor, U.S. Department of Labor, Legal Memorandum: Authority Under Executive Order 11246 (July 15, 1969), reprinted in *The Philadelphia Plan—Congressional Oversight of Administrative Agencies (The Department of Labor): Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong. 255-74 (1969) [hereinafter *Senate Phila. Plan Hearings*]. The conflict between the Comptroller General and the Attorney General raised an interesting question "whether the Executive branch of the Government has the right to act upon its own interpretations of the laws enacted by Congress, and to expend and obligate funds approved by Congress in a manner which the [Comptroller General's] Office, as the designated agent of the Congress, has found to be contrary to law." Note, *supra* note 340, at 229 (quoting *Senate Phila. Plan Hearings, supra*, at 139 (Staats statement)); Schuwerk, *supra* note 340, at 748. Clearly, under the unitary-executive theory, subordinate executive officials are responsible only to the President for their execution of the laws and not to the Comptroller General of Congress.

407. Jones, *supra* note 340, at 358-61, 364-73; Thomas D. Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 WIS. L. REV. 301, 311-12; Schuwerk, *supra* note 340, at 745-46.

408. See Schuwerk, *supra* note 340, at 757. For a discussion of the maneuvering that led up to the 1972 vote, see *id.* at 747-57.

Chairman, OMB Director Roy Ash) that the commissions were "an anomaly in government structure."<sup>409</sup> Independence had originally been intended to shield the regulatory process from the partisanship of the executive branch, but, instead, it had rendered the agencies "not sufficiently accountable to either Congress or the executive branch."<sup>410</sup> Therefore, the Council concluded, "[i]f regulation is to be more responsive to the public interest and coordinated with national programs, it must first be brought within the ambit of elective government, with accountability to those officials to whom the public and the regulated industries alike look for fair and constructive application of national policy."<sup>411</sup> To accomplish these goals, the Ash Council recommended abolishing most independent agencies and transferring their functions to newly created executive agencies headed by single administrators serving at the President's pleasure.<sup>412</sup> The adjudicative-type review previously performed by the independent agencies would henceforth be conducted by the Administrative Court of the United States.<sup>413</sup> Only in that way could the President fulfill his constitutional duty

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409. PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 13 (1971) [hereinafter ASH COUNCIL REPORT]. See generally Moreno, *supra* note 105, at 487-88.

410. ASH COUNCIL REPORT, *supra* note 409, at 14. The report elaborated:

Congress has conceived of these commissions as independent of executive branch control, but in fact the commissions are almost as independent of Congress itself. Apart from appropriations approval, periodic program review, and the intermittent interest of one or several of its members, Congress does not exercise the degree of oversight with respect to regulatory commissions that it does for executive departments and other agencies of the executive branch. Congress has sought to preserve the independence of the regulatory commissions, even as their activities increasingly affect the implementation of national policy. The executive branch, responsible for carrying out national policy, has been reluctant to support reforms needed to integrate regulatory activities with executive programs because the President does not have sufficient responsibility for commission direction.

*Id.* at 14-15.

411. *Id.* at 16. The Ash Council later noted:

Accountability is an essential element of democratic government. The Congress and the President are accountable to the people for the performance of government. In turn, agencies of government headed by appointed officials should be responsive and responsible to the Congress, to the Executive, and through them, ultimately to the public.

Without clear accountability for performance to either Congress or the President, it is not surprising that the agencies receive inadequate attention.

*Id.* at 40; see also *id.* at 15 ("Independence, and the resulting absence of regulatory accountability, has transferred to a generally shielded arena those questions which should be settled in a more open forum.").

412. *Id.* at 4-5, 20.

413. *Id.* at 6, 22.

to "take care that the laws be faithfully executed"<sup>414</sup> and his role as the person to whom the American public "looks . . . for leadership in pursuing national policy goals, including those affected by the regulatory process."<sup>415</sup>

Bolstered by the proposals of the Ash Council, Nixon proposed a massive government-wide reorganization in which all executive functions would have been consolidated into four new superagencies. This proposal eventually sank during the controversy caused by the Watergate scandal.<sup>416</sup> In the meantime, Congress defended its ability to control the independent agencies by considering a proposal to make the commissions even more independent of presidential control than they already were, by permitting them to transmit their budget requests directly to Congress. Although this proposal eventually failed, Congress did subsequently enact legislation authorizing a few agencies to submit their budgets directly to Congress,<sup>417</sup> and it granted independent litigating authority to the FTC.<sup>418</sup>

At one point during the Nixon Administration, Congress even considered a proposal to turn the Department of Justice into an independent agency.<sup>419</sup> The Administration challenged the constitutionality of this proposal through the able testimony of Assistant Attorney General Robert G. Dixon, Jr. As Dixon noted, the Article II Vesting Clause and the Take Care Clause compelled two conclusions: "First, the enforcement of the laws is an inherently executive function, and second, the executive branch has the exclusive constitutional authority to enforce laws."<sup>420</sup> Dixon also argued that making the Department of Justice independent was ill advised as a matter of democratic political theory. As Hamilton recognized in *The Federalist No. 70*, and the Landis Report and the Ash Council had recently

414. The Ash Council noted, "The President is responsible under article I[1] of the Constitution to 'take care that the laws be faithfully executed.' That duty extends to the activities of the regulatory agencies to assure that the laws enacted by Congress are carried out effectively and fairly." *Id.* at 16. The Ash Council also contended that the fact that previous presidents had offered similar regulatory reform proposals demonstrated that "these Presidents presumably felt that such recommendations were part of their responsibility to oversee faithful execution of the laws." *Id.* Furthermore, the inclusion of the independent regulatory commissions in the President's reorganization power demonstrated that Congress also "recognized the President's role in the regulatory scheme." *Id.*

415. ASH COUNCIL REPORT, *supra* note 408, at 16.

416. Percival, *supra* note 387, at 133 n.28.

417. See FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 191-92.

418. Trans-Alaska Oil Pipeline Authorization Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591-92 (1973). Nixon approved of this provision in return for the authorization of the Trans-Alaska Oil Pipeline. See Devins, *supra* note 159, at 270-71.

419. Under this proposal, the Attorney General, Deputy Attorney General, and Solicitor General would serve six-year terms and would be removable by the President only for "neglect of duty or malfeasance of office." S. 2803, 93d Cong. § 2(c) (1973).

420. *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary on S. 2803 and S. 2978*, 93d Cong. 84 (1974) [hereinafter 1974 Senate Committee Hearings] (statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel).

reaffirmed, a plural executive would tend "to conceal faults, and destroy responsibility."<sup>421</sup> Finally, Dixon argued that "an 'independent' Department of Justice would be a constitutional anomaly fundamentally inconsistent with the whole theory of a tripartite government envisioned by the Founding Fathers and specified in the first three articles of the Constitution."<sup>422</sup>

Former Attorney General Nicholas Katzenbach agreed, arguing that the president "is responsible for the administration of the law and should be, and can be, held accountable for that stewardship."<sup>423</sup> Even Archibald Cox opposed the notion that the Attorney General should be made independent of presidential control: "I believe in focusing individual responsibility . . . . There is no substitute for that responsibility. No president should be relieved of it—or of the consequences of default."<sup>424</sup> Indeed, any attempt to insulate the Attorney General from presidential direction would have the effect of erecting the "presumption that our Attorneys General cannot be trusted. The presumption should be the other way, and they should be held responsible when they were proved incompetent or unfaithful."<sup>425</sup>

Perhaps most dramatically, Nixon asserted his right to control the execution of the laws throughout the Watergate scandal. The issue first arose during the hearings concerning Elliott Richardson's confirmation as Attorney General. Richardson agreed, in principle, that a special prosecutor should be appointed, but insisted on the importance "that the Attorney General must retain ultimate responsibility" for the special prosecutor's work.<sup>426</sup> Alternatively, the special prosecutor could be responsible only to the chief executive, since "Executive power is vested in the President [by the Constitution], and since it has been ruled by the Supreme Court that the conduct of investigations and prosecutions as defined by the law are executive branch functions."<sup>427</sup> Richardson insisted, "I know of no way constitutionally whereby any individual who has been vested with prosecutorial responsibility can be removed from responsibility to a superior within the executive branch."<sup>428</sup>

Nixon's belief in his sole authority to control the execution of the law was demonstrated most dramatically by the "Saturday Night Massacre," in which he directed Attorney General Richardson and Deputy Attorney

421. *Id.* at 86.

422. *Id.* at 89.

423. *Id.* at 153 (statement of Nicholas Katzenbach, Former Attorney General).

424. *Id.* at 209 (statement of Archibald Cox, Former Special Prosecutor in the Department of Justice).

425. 1974 Senate Committee Hearings, *supra* note 420, at 211 (statement of Archibald Cox, Former Special Prosecutor in the Department of Justice).

426. *Nomination of Elliot L. Richardson to Be Attorney General: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong. 5 (1973) [hereinafter *Richardson Confirmation Hearings*] (testimony of Elliot L. Richardson, Secretary of Defense).

427. *Id.* at 132.

428. *Id.* at 139. See generally *EASTLAND*, *supra* note 6, at 31–34.



General William Ruckelshaus to remove Archibald Cox as Watergate special prosecutor, notwithstanding the Justice Department order granting Cox the "greatest degree of independence that is consistent with the Attorney General's statutory accountability" and providing that Cox would not be removed "except for extraordinary improprieties on his part."<sup>429</sup> After Richardson resigned and Ruckelshaus was removed for refusing to fire Cox, the task fell to Solicitor General Robert Bork. Although regrettable, the Saturday Night Massacre remains a vivid, if controversial, assertion of Nixon's belief in his authority to control the execution of the law.

The Nixon Administration continued to press its belief in the impropriety of insulating executive functions from presidential control when opposing the welter of bills seeking to authorize the appointment of temporary special prosecutors under the control of the courts. In Senate hearings on the legislation, Acting Attorney General Bork testified that "[t]he executive alone has the duty and the power to enforce the laws by prosecutions brought before the courts."<sup>430</sup> Giving such authority to another branch "is simply not our system of government."<sup>431</sup> Bork offered a similar observation in his testimony before a House subcommittee, arguing that "[t]o suppose that Congress can take that duty from the Executive and lodge it in either itself or in the courts is to suppose that Congress may by mere legislation alter the fundamental distribution of powers dictated by the Constitution."<sup>432</sup>

Over time, many leading Department of Justice officials have questioned the conventional wisdom that the Saturday Night Massacre showed the need for a prosecutorial institution operating independently of presidential control.<sup>433</sup> The political uproar following Cox's dismissal forced Nixon to appoint another special prosecutor, Leon Jaworski, who completed the Watergate investigation and drove Nixon out of office. The aftermath to the Saturday Night Massacre showed how political constraints can ensure the effectiveness of investigations of high-level government misconduct without resort to constitutionally problematic institutional arrangements. From this perspective, it is Jaworski's successful completion of the Watergate

429. Office of Watergate Special Prosecution Force, 38 Fed. Reg. 14,688 (June 4, 1973).

430. *Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong. 451 (1973) (statement of Acting Attorney General Robert Bork).

431. *Id.*

432. *Special Prosecutor and Watergate Grand Jury Legislation: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong. 253 (1973). See generally EASTLAND, *supra* note 6, at 40-41.

433. *The Future of the Independent Counsel Act: Hearings Before the Senate Comm. on Governmental Affairs*, 106th Cong. 29 (1999) [hereinafter 1999 Senate Committee Hearings] (testimony of former Attorney General Griffin B. Bell); *id.* at 57 (testimony of former Independent Counsel Joseph E. diGenova); *id.* at 148 (testimony of Clinton counsel Robert S. Bennett); *id.* at 245 (testimony of Attorney General Janet Reno); *id.* at 425 (testimony of Independent Counsel Kenneth W. Starr).

prosecution rather than Cox's removal that shows the central lesson for the separation of powers. Regardless of where one comes down in this debate, the fact remains that Cox's removal and the Administration's opposition to congressional attempts to authorize special prosecutors operating independently of presidential control represent prominent examples of Nixon's steadfast insistence on the unitariness of the executive branch.

Nixon had an extraordinary belief that, as president and pursuant to his implied powers, he could authorize FBI actions on national security grounds that were otherwise in violation of statutes. This was a Lincolnian claim of emergency power made during an emergency far less dire than Lincoln had faced in the Spring of 1861. Thus, Nixon defended a plan targeted at violent radicals such as the Black Panthers against charges of illegality by saying that "when the president approves an action because of national security, because of a threat to internal peace . . . the President's decision . . . is one that enables those who carry it out to carry it out without violating a law."<sup>434</sup> This view that as president he could sanction actions in violation of statutes is one reason that Nixon was quite deserving of being the first president in American history to be forced to resign. A related step Nixon took was to impound funds appropriated by Congress so executive employees could not spend them.<sup>435</sup> This practice was eventually stopped by Congress in 1974, when Nixon had been weakened by Watergate and Congress passed by overwhelming majorities the Budget and Impoundment Control Act, which made it very hard for future presidents to impound funds.<sup>436</sup> The Act also, unfortunately, established the Congressional Budget Office as a counterweight to OMB.<sup>437</sup>

One remarkable feature of the Nixon White House was the organization of the "White House Special Investigations Unit," later known as the Plumbers, to undertake illegal activities such as breaking into the office of Nixon foe Daniel Ellsberg's psychiatrist—an illegal action that Nixon appears to have ordered.<sup>438</sup> This action was ultimately followed by a group of White House operatives breaking into the headquarters of the Democratic National Committee, thus launching the Watergate scandal.<sup>439</sup> Ultimately, Nixon's presidency was undone by "a variety of illegal and extralegal political actions directed by the president and his chief assistants, including the former attorney general of the United States, that attempted to subvert the American political system."<sup>440</sup>

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434. SMALL, *supra* note 366, at 57.

435. *Id.* at 200.

436. *Id.*

437. *Id.* at 200–01.

438. *Id.* at 237–38.

439. SMALL, *supra* note 366, at 256.

440. *Id.* at 273.

Nixon presided over the transformation of the Postal Service "from the cabinet to become the independent, self-supporting U.S. Postal Service, owned by the federal government."<sup>441</sup> In one sense this action weakened presidential control over postal employees. At the same time, it improved the quality of service of the Post Office, and there is nothing in the theory of the unitary executive to preclude the government from owning a corporation as federal property.

Nixon also opposed congressional attempts to interfere with the president's execution of the laws through the legislative veto. Although he did not continue Johnson's opposition to "report and wait provisions" or committee approval requirements directed at Congress,<sup>442</sup> Nixon offered numerous objections to provisions more properly regarded as legislative vetoes. For example, Nixon objected to a provision of the Second Supplemental Appropriations Act of 1972 that subjected approval of three building projects to a committee veto.<sup>443</sup> According to Nixon, such committee vetoes "infring[ed] on the fundamental principle of the separation of legislative and executive powers."<sup>444</sup> After Congress persisted in its efforts to include a committee veto,<sup>445</sup> Nixon announced that he would disregard it.<sup>446</sup>

Nixon also objected that a committee veto contained in the Public Buildings Amendments of 1972<sup>447</sup> was an unconstitutional "infring[ement]

441. *Id.* at 196.

442. Early in his Administration, President Nixon announced that "this Administration will interpose no objection to the procedures involved in the accomplishment of watershed projects under" the Omnibus Rivers and Harbors Act and released the funds impounded by President Johnson. Memorandum from President Richard M. Nixon to Secretary of Agriculture Hardin (Mar. 27, 1969), *quoted in* Watson, *supra* note 96, at 1029; *see also* Louis Fisher, *The Politics of Impounded Funds*, 15 ADMIN. SCI. Q. 361, 374 (1970). Nixon subsequently approved a similar provision in the Public Buildings Amendments of 1972, noting that "[t]he Congress regards this 'no appropriation may be made' provision as internal Congressional rulemaking which does not affect the executive branch. This Administration has acquiesced in that construction." Statement About Signing the Public Buildings Amendments of 1972 (June 17, 1972), *in* 1972 PUB. PAPERS 686, 687 (approving of Public Buildings Amendments of 1972, Pub. L. No. 92-313, § 7(a), 86 Stat. 216, 221); *see also* Statement About Signing the Second Supplemental Appropriations Act, 1972 (May 28, 1972), *in* 1972 PUB. PAPERS 627, 627 ("The Congress regards this 'no appropriation may be made' provision, I understand, as internal Congressional rule-making not affecting the executive branch, and this Administration has acquiesced in that construction."). Nixon thereafter signed numerous such provisions into law without comment. *See generally* Fisher, *Legislative Veto*, *supra* note 96, at 284; Watson, *supra* note 96, at 1029.

443. Second Supplemental Appropriations Act of 1972, Pub. L. No. 92-306, 86 Stat. 163, 175.

444. Statement About Signing the Second Supplemental Appropriation Act, 1972, *supra* note 442, at 627.

445. Act of June 14, 1972, Pub. L. No. 92-313, § 5(f), 86 Stat. 216, 220.

446. Statement About Signing the Public Buildings Amendments of 1972 (June 17, 1972), *in* 1972 PUB. PAPERS 686, 687; *see also* Watson, *supra* note 96, at 1025 n.215.

447. Public Buildings Amendments of 1972, Pub. L. No. 92-313, §§ 5(f), 7, 86 Stat. 220, 221.

upon the fundamental principle of the separation of legislative and executive powers" because it conditioned "the authority of the executive branch upon an action by committees of the Congress." Consequently, President Nixon directed the General Services Administration to disregard those legislative-veto provisions and submit remedial legislation.<sup>448</sup> Relatedly, Nixon vetoed the War Powers Resolution, in part because of the legislative-veto provision it contained.<sup>449</sup> Even though Nixon did subsequently sign several legislative-veto provisions into law without comment,<sup>450</sup> his previous objections were doubtlessly sufficient to preserve his constitutional challenge for the purposes of coordinate construction.

Although Richard Nixon's presidency was deeply problematic because of the many violations of federal law that he committed, Nixon did not acquiesce in any deviation from the theory of the unitary executive. We believe that Congress was right to force Nixon to resign under threat of impeachment, but it is vital to remember that this was accomplished without an independent-counsel law. Watergate thus shows not that such a law is needed, but rather that the traditional system of checks and balances can be made to work.

## VI. GERALD R. FORD

When Gerald R. Ford came to the White House, he had every reason to expect that he would be hard pressed to defend the prerogatives of the executive branch, given that Watergate had effectively destroyed public confidence in the presidency. Moreover, having never run for national office, Ford lacked the mandate and the broad base of political support needed for vigorous presidential action. More than any other post-World War II president, one could have expected Ford to acquiesce in congressionally imposed invasions on the unitariness of the executive branch. Instead, Ford held firm and defended the unitariness of the executive.

When Ford assumed office, his biographer, John Robert Greene, notes that "[p]olitical sagacity dictated that [he] fire the Nixon people as quickly as possible and when he installed his own advisers that he steer clear of a

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448. Statement About Signing the Public Buildings Amendments of 1972, *supra* note 446, at 687-88.

449. Veto of the War Powers Resolution (Oct. 24, 1973), in 1973 PUB. PAPERS 893, 893, 895 (objecting that the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), violated the Constitution). Congress overrode Nixon's veto. 119 CONG. REC. 36,198, 36,221-22 (1973). See generally Robert G. Dixon, Jr., *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. REV. 423, 428 & n.21 (1978); Watson, *supra* note 96, at 1016 n.160.

450. See, e.g., Act of Mar. 24, 1972, Pub. L. No. 92-261, § 5, 86 Stat. 103, 107; Act of Oct. 21, 1972, Pub. L. No. 92-520, sec. 3, §. 18(d)(4), 86 Stat. 1019, 1021; Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627. Nixon even proposed a legislative-veto provision, but he eventually vetoed the underlying legislation on other grounds. See Watson, *supra* note 96, at 1016 n.160. See generally *id.* at 1009, 1016 n.160, 1026 n.215, 1029.

Haldeman-like chief of staff."<sup>451</sup> Ford immediately indicated that White House Chief of Staff Alexander Haig could stay on for a short while, but that he would soon be replaced by a young Donald Rumsfeld.<sup>452</sup> Rumsfeld's strong personality guaranteed that there would be at least some centralized control of White House operations and of the executive branch more generally. During the one-month honeymoon period between Nixon's resignation and Ford's pardon of Nixon, public opinion began to support the idea of a strong cabinet, "[a]s most of the country had come to view the Nixon White House as a fortress where access was forbidden and advice ignored."<sup>453</sup> Ford made some moves toward a stronger cabinet, but he did not totally buck the modern trend toward strong White House staffs. "The pattern that actually emerged in Ford's administration fell in between these extremes of policy development. Ford's style with his cabinet was neither as heavy-handed as Nixon's nor did it offer a collegial return to cabinet government."<sup>454</sup>

The first two major issues of the Ford presidency emerged one month into his Administration when he pardoned both former President Richard M. Nixon and many of those individuals who had evaded the draft during the Vietnam War. These two pardons "destroyed [Ford's] honeymoon with the American people."<sup>455</sup> The pardon of the draft evaders was a major decision about the execution of the criminal laws based on Ford's belief that it was necessary to bring to an end the "'long national nightmare' of the sixties."<sup>456</sup> This pardon gave Ford a reputation as a conciliator,<sup>457</sup> and it was in accord with previous exercises of the pardon power to bring the American people together after a major war.

The question of whether to pardon Nixon had "hung over the administration like the sword of Damocles," since it had been a major item of discussion at Ford's first cabinet meeting.<sup>458</sup> Ford felt the pardon was appropriate both because of Nixon's precarious health—a trial might have killed him—and because he wanted to, in the language of the Preamble of the Constitution, "ensure domestic tranquility."<sup>459</sup> Obviously, the two pardons together were a major executive decision made by Ford personally about what degree of law enforcement would best serve the interests of the nation. The fact that Ford made these two law-enforcement decisions

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451. JOHN ROBERT GREENE, *THE PRESIDENCY OF GERALD R. FORD* 24 (1995).

452. *Id.* at 25.

453. *Id.* at 28.

454. *Id.* at 29.

455. *Id.* at 35.

456. GREENE, *supra* note 451, at 39.

457. *Id.*

458. *Id.* at 45.

459. *Id.* at 52.

himself as the nation's chief law-enforcement officer is telling support for the theory of the unitary executive.

After the Nixon pardon, congressional power vis-à-vis the executive branch began to grow enormously, continuing a trend that began in the Johnson and Nixon Administrations. The public perception of the time was that there had grown up what was called, in Arthur Schlesinger's words, an imperial presidency<sup>460</sup> and that the time had come to restore some power to Congress. The "stinging" and "bipartisan" opposition on Capitol Hill to the Nixon pardon began a long process of power flowing away from the White House.<sup>461</sup> "A new day had dawned, and Ford had to work in that new day—clearly, the locus of power in the federal government had shifted back from the White House to Capitol Hill."<sup>462</sup>

After two of Richard Nixon's Attorneys General were convicted of crimes, it was essential that Ford pick a person of impeccable character to serve in that role. Ford did precisely that by turning to Edward Levi, then the president of the University of Chicago. "Levi made it clear to Ford early in the nominating process that he would not take the job unless Justice was made apolitical."<sup>463</sup> Ford and Levi together faced many crises, including the threat of violence attending school desegregation in Boston. "Ford was ready to intercede if violence broke out. He had ordered the Department of Defense to put fifteen hundred troops of the Eighty-second Airborne on an increased state of readiness, which would allow them to be in Boston in nine hours."<sup>464</sup> This shows how seriously Ford took his obligation faithfully to execute the laws.

In May 1975, Ford presided as Commander in Chief over the rescue of American passengers and crew on the *Mayaguez*, a ship that was captured by the Cambodians. Strikingly, Ford took military action without consulting Congress under the recently enacted War Powers Act,<sup>465</sup> and when members of Congress complained about his failure to consult them he said, "It is my constitutional responsibility to command the forces and to protect Americans."<sup>466</sup>

In November 1975, Ford made major personnel changes in his Administration that showed he was not afraid to remove people when he thought it necessary to do so. First, Ford asked for the resignations of Defense Secretary James Schlesinger and CIA Director William Colby. He also removed the ailing Rogers Morton as Commerce Secretary, and he stripped Secretary of State Henry Kissinger of his second job as White House

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460. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1989).

461. GREENE, *supra* note 451, at 54–55.

462. *Id.* at 58.

463. *Id.* at 88–89.

464. *Id.* at 89.

465. *Id.* at 150.

466. GREENE, *supra* note 451, at 148.

National Security Advisor.<sup>467</sup> George H.W. Bush replaced Colby at the CIA; Rumsfeld replaced Schlesinger at the Pentagon; and a young Dick Cheney replaced Rumsfeld as White House Chief of Staff.<sup>468</sup> The next day, it was announced that Ford would drop Vice President Nelson Rockefeller from the ticket when Ford ran for reelection in 1976. This was a move to reach out to conservatives then gathering around the White House candidacy of Ronald Reagan, since conservatives detested Rockefeller and were certain to be disappointed by Ford's firing of Schlesinger.<sup>469</sup> With these bold and decisive personnel moves, Ford showed that he and he alone was firmly in control of the executive branch.

There was one other prominent removal during the Ford years: the firing of Agriculture Secretary Earl Butz in the middle of Ford's reelection campaign. Butz foolishly told off-color jokes to *Rolling Stone* Magazine correspondent John Dean that were subsequently published in the national press to the great embarrassment of the Administration. "On Monday morning Butz met with Ford; around noon, with tears in his eyes, he went before the press and resigned. Ford's assessment of Dean was entirely predictable: 'a low-down, no-good, son of a bitch. A sniveling bastard.'"<sup>470</sup>

Ford took other steps that demonstrated his willingness to take control of his Administration. For example, Ford did not hesitate to direct the actions of subordinate executive officials, at one point directing the Department of Health, Education, and Welfare to suspend a rule so that it could be reexamined.<sup>471</sup> Ford also continued the Quality of Life program begun by President Nixon, adding the requirement that major rules include an "inflation impact statement" comparing the costs and inflationary effects with the benefits of the rules.<sup>472</sup> These statements would then be reviewed by the newly formed Council on Wage and Price Stability, although such review would only proceed after the proposed rule had been published in the Federal Register and the Council had no power to mandate changes in the rules.<sup>473</sup>

467. *Id.* at 161.

468. *Id.*

469. *Id.* at 160-62.

470. *Id.* at 183.

471. See Bruff, *supra* note 388, at 465 n.67; Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 494 (1988).

472. Exec. Order No., 11,821, 3 C.F.R. 926 (1971); OMB Circular A-107 (Jan. 28, 1975); see also Exec. Order No. 11,949, 3 C.F.R. 161 (1976) (extending Exec. Order No. 11,821).

473. See O'Reilly & Brown, *supra* note 387, at 426-27; Percival, *supra* note 387, at 138-41; see also Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 547 (1989); Cross, *supra* note 471, at 494; Moreno, *supra* note 105, at 489; DeWitt, *supra* note 387, at 770-71. Some scholars have concluded that this program improved the economic analysis and influenced the decisions of some agencies. See ABA COMM'N ON LAW & THE ECON., *FEDERAL REGULATION: ROADS TO REFORM* 85 (1979); Percival, *supra* note 387, at 140; Charles W. Vernon, III, Note, *The Inflation Impact Statement Program: An Assessment of the First Two Years*, 26

Ford also rebuffed congressional attempts to impinge upon the president's authority to execute the law as seen when members of the Ford Administration testified against the establishment of independent prosecutors. Attorney General Levi maintained that the creation of a special prosecutor appointed by the judiciary was "constitutionally dubious."<sup>474</sup> Assistant Attorney General Michael M. Uhlmann challenged the constitutionality of the proposal as well, on the grounds that control of prosecution lay at "the very core of 'executive functions.'"<sup>475</sup> Deputy Attorney General Harold Tyler, Jr., similarly criticized the proposal as "constitutionally inappropriate" because "[u]nlike any other officer of the Executive branch [the special prosecutor's] removal would be beyond the discretion of the President."<sup>476</sup>

Ford instead offered a proposal in which special prosecutors would be appointed by the president to three-year terms, confirmed with the advice and consent of the Senate, and subject to supervision and removal by the Attorney General.<sup>477</sup> The Senate approved Ford's proposal by a vote of ninety-one to five, but the House declined to do so on the grounds that the creation of a permanent position would lead to the instigation of too many special-prosecutor investigations. Members of the House instead favored a temporary special prosecutor appointed by a special panel of judges.<sup>478</sup> In retrospect, it is now clear that the House had it precisely backwards. It is the absence of executive control rather than the permanence of the office that represents the greater danger.<sup>479</sup> However, the fact that Congress declined to enact this legislation does not weaken the constitutional import of the President's insistence that executive functions remain subject to presidential control.

As a Congressman, Ford had supported the creation of an independent consumer agency, but in 1975 President Ford announced that he had come

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AM. U. L. REV. 1138, 1160-61 (1977). Others have disagreed, arguing that the inflation impact statements amounted to little more than "post-hoc justifications for decisions already reached." O'Reilly & Brown, *supra* note 387, at 427; see also Bruff, *supra*, at 547; Moreno, *supra* note 105, at 489.

474. *Provision for Special Prosecutor: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong. 29-30 (1976); accord *id.* at 33-34 (arguing that the institution of special prosecutors operating outside of presidential control was of "questionable constitutionality").

475. *Watergate Reorganization and Reform Act of 1975: Hearings Before the Senate Comm. on Government Operations*, 94th Cong. 3 (1975); see LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 146 (1992).

476. Statement of Deputy Attorney General Harold R. Tyler, Jr., Concerning S. 495 Before the Senate Judiciary Committee (May 26, 1976), quoted in EASTLAND, *supra* note 6, at 53.

477. H.R. DOC. NO. 94-550, at 2 (1976).

478. See EASTLAND, *supra* note 6, at 54-56; Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 621-23 (1998).

479. See *supra* note 9 and accompanying text; *infra* Part XI.



to oppose the idea, and was able to kill the plan with a veto threat.<sup>480</sup> David Lewis observes:

Ford's change of heart about the wisdom of a new independent consumer agency coincided with his move from the House of Representatives to the White House. He is an excellent example of how the incentives of presidents are different from those of members of Congress and how much influence presidents can have over the design of administrative agencies.<sup>481</sup>

Furthermore, after a slow start,<sup>482</sup> Ford began to challenge the legislative veto as an impermissible invasion of the unitary executive. At first, Ford was only willing to question the device, issuing a signing statement challenging the legislative veto as improperly "inject[ing] the Congress into the process of administering education laws" and "attempting to stretch the constitutional role of the Congress."<sup>483</sup> Although Ford acknowledged that "[t]he Congress can and should hold the executive branch to account for its performance," he also recognized that for "Congress to attempt to administer Federal programs is questionable on practical as well as constitutional grounds."<sup>484</sup> Accordingly, President Ford "asked the Attorney General for advice on these provisions."<sup>485</sup> Two months after seeking guidance from the Attorney General, Ford's opposition to these provisions stiffened when he vetoed a bill because it contained a two-house legislative veto.<sup>486</sup> Ford also objected to legislative vetoes twice more in 1975, calling the legislative veto "an unconstitutional exercise of Congressional power."<sup>487</sup>

480. LEWIS, *supra* note 34, at 70.

481. *Id.* at 70–71.

482. During the early stages of the Ford Administration, President Ford signed numerous bills containing legislative vetoes without any objection. Dixon, *supra* note 449, at 428; Watson, *supra* note 96, at 1016 n.160, 1029.

483. Statement on the Education Amendments of 1974 (Aug. 21, 1974), in 1974 PUB. PAPERS 35, 37.

484. *Id.*

485. *Id.*

486. Veto of Atomic Energy Act Amendments (Oct. 12, 1974), in 1974 PUB. PAPERS 294, 294 (objecting that the legislative veto violated Article I, section 7, of the Constitution). As Professor Dixon has noted, this was "one of the more unusual versions of a legislative veto." Dixon, *supra* note 449, at 430 n.24. Under the vetoed provisions, the Act would not become effective until after the Joint Committee on Atomic Energy submitted its evaluation of a particular study and Congress adopted a concurrent resolution. "In effect, Congress here was reversing the normal legislative process and asking for presidential approval of substantive legislation before Congress was ready to commit itself to support the legislation." Dixon, *supra* note 449, at 430 n.24. President Ford suggested that the bill was "merely the expression of an intent to legislate," rather than actual legislation. Veto of Atomic Energy Act Amendments, *supra*, at 294.

487. Statement on Signing a Bill Amending Child Support Provisions of the Social Security Act (Aug. 11, 1975), in 1975 PUB. PAPERS 1148, 1149; Statement on Signing the Amtrak Improvement Act of 1975 (May 26, 1975), in 1975 PUB. PAPERS 724, 724. Ford nonetheless signed the Amtrak Improvement Act of 1975, Pub. L. No. 94-25, sec. 8, § 404(c)(3), 89 Stat. 90,

In the latter of these two instances, Ford instructed the Secretary of Health, Education, and Welfare "to treat this provision . . . simply as a request for information about the proposed standards in advance of their promulgation."<sup>488</sup> Furthermore, Assistant Attorney General Antonin Scalia tirelessly testified before Congress in opposition to the legislative veto.<sup>489</sup>

But it was not until 1976 that Ford offered his boldest criticisms of the legislative veto.<sup>490</sup> Ford entered no fewer than six vetoes<sup>491</sup> and five signing statements<sup>492</sup> criticizing the legislative veto, basing many of his objections on the unitariness of the executive branch.<sup>493</sup> At one point, Ford noted:

The exercise of an otherwise valid Executive power cannot be limited by a discretionary act of a committee of Congress nor can a

91, "because the Nation needs the important passenger rail service it will provide." Statement on Signing the Amtrak Improvement Act of 1975, *supra*, at 724.

488. Statement on Signing a Bill Amending Child Support Provisions of the Social Security Act, *supra* note 487, at 1149.

489. Dixon, *supra* note 449, at 428 n.22 (citing numerous testimonials by Scalia in Congressional hearings: *Congressional Review of Administration Rulemaking: Hearings on H.R. 3658, H.R. 8231, and related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 373 (1975); *Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 167, 173-74, 183-87 (1975); *Improving Congressional Oversight of Federal Regulatory Agencies: Hearings on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. 80-81, 124 (1976); *Congressional Review of International Agreements: Hearings on H.R. 4438 Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. 182 (1976)); Symposium, *Oversight and Review of Agency Decisionmaking Part II, Morning Session*, 28 ADMIN. L. REV. 661, 684-95, 700-01 (1976) (remarks of Antonin Scalia)).

490. *See id.* at 429-30 n.24 (noting Ford's growing opposition to legislative vetoes). Ford's attack on the legislative veto occurred at a time when the House had passed a proposal to subject all agency rules to a legislative veto. 122 CONG. REC. 31,668 (1976); *see also* FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 142.

491. Remarks Upon Vetoing the Hatch Act Amendments Bill (Apr. 12, 1976), in 1976-77 PUB. PAPERS 1114; Veto of the Foreign Assistance Bill (May 7, 1976), in 1976-77 PUB. PAPERS 1481, 1482; Veto of the Federal Fire Prevention and Control Bill (July 7, 1976), in 1976-77 PUB. PAPERS 1984; Veto of the Federal Insecticide, Fungicide, and Rodenticide Extension Bill (Aug. 14, 1976), in 1976-77 PUB. PAPERS 2144; Memorandum of Disapproval of the International Navigational Rules Act of 1976 (Oct. 10, 1976), in 1976-77 PUB. PAPERS 2481; Memorandum of Disapproval of the Agricultural Resources Conservation Bill (Oct. 20, 1976), in 1976-77 PUB. PAPERS 2583; *see also* BOLTON, *supra* note 229, at 10 n.24; Dixon, *supra* note 449, at 429-30 n.24.

492. Statement on Signing the Department of Defense Appropriation Act of 1976 (Feb. 10, 1976), in 1976-77 PUB. PAPERS 241, 242; Statement on Signing the Federal Election Campaign Act Amendments of 1976 (May 11, 1976), in 1976-77 PUB. PAPERS 1529, 1530; Statement on Signing the International Security Assistance and Arms Export Control Act of 1976 (July 1, 1976), in 1976-77 PUB. PAPERS 1936, 1937; Statement on Signing the National Emergencies Act (Sept. 14, 1976), in 1976-77 PUB. PAPERS 2249; Statement on Signing the Veterans' Education and Employment Assistance Act of 1976 (Oct. 15, 1976), in 1976-77 PUB. PAPERS 2538, 2539; *see also* Dixon, *supra* note 449, at 429 nn.23-24.

493. Ford also challenged the legislative veto as a violation of Article I, section 7. *See, e.g.*, Statement on Signing the National Emergencies Act, *supra* note 492, at 2249.

committee give the Executive a power which it otherwise would not have. The legislative branch cannot inject itself into the Executive functions, and opposition to attempts of the kind embodied in this bill has been expressed for more than 50 years.<sup>494</sup>

Similarly, Ford later objected that legislative-veto provisions "purported to involve the Congress in the performance of day-to-day executive functions in derogation of the principle of separation of powers, resulting in the erosion of the fundamental constitutional distinction between the role of the Congress in enacting legislation and the role of the executive in carrying it out."<sup>495</sup> Ford repeatedly announced his support for challenging the constitutionality of the practice in court.<sup>496</sup>

Thus, even though Ford at times tolerated the enactment of legislative vetoes,<sup>497</sup> there can be little doubt that Ford raised numerous objections and exerted sufficient control over his subordinates, overcoming any suggestion that he acquiesced in congressional interference in the execution of the laws. Despite all the handicaps that Gerald Ford faced as an unelected

494. Statement on Signing the Department of Defense Appropriation Act of 1976, *supra* note 492, at 242.

495. Statement on Signing the International Security Assistance and Arms Export Control Act of 1976, *supra* note 492, at 1937; *see also* Statement on Signing the National Emergencies Act, *supra* note 492, at 2249 ("Such provisions are contrary to the general constitutional principle of separation of powers whereby Congress enacts laws but the President and the agencies of government execute them."); *see also* BOLTON, *supra* note 229, at 12.

496. Statement on Signing the Federal Election Campaign Act Amendments of 1976, *supra* note 492, at 1530 ("direct[ing] the Attorney General to challenge the constitutionality of [the legislative veto] at the earliest possible opportunity"); Statement on Signing the International Security Assistance and Arms Export Control Act of 1976, *supra* note 492, at 1937 (reserving his right to challenge the constitutionality of a legislative-veto provision); Statement on Signing the National Emergencies Act, *supra* note 492, at 2249 (noting that the Attorney General was challenging the constitutionality of the legislative veto in the Federal Election Campaign Act).

Despite its stated intentions, the Ford Administration's brief in *Buckley v. Valeo*, 424 U.S. 1 (1976), chose to portray the Federal Election Commission as a legislative agency and to argue that as a legislative agency it could not constitutionally exercise any executive functions. Brief for the Attorney General as Appellee and for the United States as Amicus Curiae at 110-20, *Buckley* (No. 75-436). This position necessarily forced the Ford Administration to forego any challenges to the legislative veto, since any vetoes over the Commission's actions could not be cast as an attempt by Congress to control an executive officer or as a method by which Congress could change the law without presidential participation. *Id.* at 111-12. In accordance with the Administration's position, the Supreme Court did not reach the issues surrounding the legislative veto. 424 U.S. at 140 n.176 (per curiam). *But see id.* at 284-85, 285-86 (White, J., dissenting) (defending the constitutionality of the legislative veto). The Ford Administration did intervene as a plaintiff in a suit brought by former Attorney General Ramsey Clark, challenging the constitutionality of the legislative veto. This case, however, was dismissed as unripe. *Clark v. Valeo*, 559 F.2d 642, 647 (D.C. Cir. 1977) (en banc), *aff'd sub nom.* *Carl v. Kimmit*, 431 U.S. 950 (1977); *see also* May, *supra* note 302, at 943.

497. *See* BOLTON, *supra* note 229, at 10 n.24; FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 142-43; May, *supra* note 302, at 942.

president and as a result of the Nixon pardon, Ford still emerged as a steady defender of the president's authority to execute the laws.

#### VII. JIMMY CARTER

The Administration of Jimmy Carter almost certainly represents the nadir of presidential power in the post-World War II era. Unable to articulate a clear vision for the country and beset by the oil and Iranian hostage crises, Carter proved ill-suited to assume the strong leadership role taken by many of his predecessors.<sup>498</sup> His political weaknesses, however, did not translate into a willingness to allow control over the execution of the law to be transferred from the White House to Capitol Hill. On the contrary, in spite of its other problems, the Carter Administration appears, for the most part, to have solidly defended the unitariness of the executive branch.

At the outset, it must be noted that that Carter wanted to run his own White House and thus began his Administration with no strong White House chief of Staff. Carter's biographer, Burton I. Kaufman, reports that:

Carter organized the White House staff intending that his cabinet secretaries have direct access to him. In particular, there was to be no chief of staff able to control and regulate the vital arteries of communication between the Oval Office and the rest of the administration—as had H.R. Haldeman during the Nixon administration, and, to a lesser extent, Richard Cheney and Donald Rumsfeld during the Ford administration.<sup>499</sup>

Carter was obsessed with detail and spent too much time planning his Administration during the transition<sup>500</sup> and then throughout the course of his presidency.

By the end of his first year in office, this combination of attention to detail and close management led “[v]oters . . . [to complain] that the president was trying to do too much at once, [and] that he was trying to do too much himself.”<sup>501</sup> This overreaching was evident in all policy areas, including foreign policy, which was being made in the Oval Office and not the State Department.<sup>502</sup> After a major cabinet shake-up toward the end of his Administration, following his famous speech in which he claimed that the nation was suffering from a spirit of malaise,<sup>503</sup> “Carter named Hamilton Jordan as chief of staff and instructed the rest of the White House to obey

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498. In fact, Carter has subsequently indicated that he actively sought to reduce the imperial status of the Presidency. JIMMY CARTER, KEEPING FAITH 27 (1982).

499. BURTON I. KAUFMAN, THE PRESIDENCY OF JIMMY CARTER 27 (1993).

500. *Id.*

501. *Id.* at 65.

502. *Id.* at 37.

503. Energy and National Goals Address to the Nation (July 15, 1979), in 1979 PUB. PAPERS 1235, 1237.

Jordan's orders 'as if they were the president's own.'<sup>504</sup> This was a response to critics who had believed Carter needed a strong chief of staff to keep both the President and the White House running smoothly.<sup>505</sup>

Jimmy Carter was not at all shy about using the removal power. During the major cabinet shake-up alluded to above, in which Health, Education, and Welfare Secretary Joseph Califano, Treasury Secretary Michael Blumenthal, and Energy Secretary James Schlesinger were all essentially fired,<sup>506</sup> Carter requested the pro forma resignations of all his Cabinet members so he could decide which ones he wanted to keep. In addition, there were a number of other very dramatic removals from office during the Carter years. After General John K. Singlaub, the third-ranking army officer in Korea, publicly said that Carter's removal of troops from South Korea would in his judgment lead to war, the President "immediately relieved Singlaub of his command and ordered him home," thus "[r]eplicating President Harry Truman's firing of General Douglas MacArthur in 1951 for questioning official policy."<sup>507</sup> During the scandal involving his OMB Director Bert Lance, Carter essentially pushed Lance into resigning<sup>508</sup> in what was effectively the removal of one of his best friends. Finally, with Carter's support, Attorney General Griffin Bell fired a Ford-holdover U.S. Attorney in Philadelphia, David Marston, in yet another dramatic illustration of the Carter Administration's broad willingness to use its removal power.<sup>509</sup>

But most important are the specific efforts President Carter made in the wake of Richard Nixon's forced resignation from office to protect presidential prerogatives from a self-aggrandizing Congress. Critically, the Carter Administration shelved a proposal, advanced during the 1976 presidential election campaign, to respond to Watergate-era abuses by turning the entire Justice Department into an independent agency with the Attorney General appointed for a fixed ten-year term. Carter himself endorsed this idea on *Meet the Press*, but, once he took office, Attorney General Griffin Bell squashed the proposal.

In order to convince the President of the problems with turning the Justice Department into an independent agency, Bell wrote of his "serious doubt as to the constitutionality" of the plan.<sup>510</sup> According to Bell, "[t]he first sentence of Article II vests the executive power of the Government in the President and charges him with the general administrative responsibility for executing the laws of the United States."<sup>511</sup> When combined with the

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504. KAUFMAN, *supra* note 499, at 146.

505. *Id.*

506. *Id.* at 145.

507. *Id.* at 47.

508. *Id.* at 63.

509. KAUFMAN, *supra* note 499, at 79.

510. 1 Op. Off. Legal Counsel 75, 75 (1977).

511. *Id.*

Appointments and Take Care Clauses, Bell concluded that "the President is given not only the power, but also the constitutional obligation to execute the laws."<sup>512</sup> Moreover, Bell pointed out that the Supreme Court had made it clear in *Myers v. United States*<sup>513</sup> that "the President's freedom to remove executive officials cannot be altered by legislation."<sup>514</sup> This was particularly true for the Attorney General:

The Attorney General is the chief law enforcement officer of the United States. He acts for the President to ensure that the President's constitutional responsibility to enforce the laws is fulfilled. To limit a President in his choice of the officer to carry out this function or to restrict the President's power to remove him would impair the President's ability to execute the laws.

Indeed, the President must be held accountable for the actions of the executive branch; to accomplish this he must be free to establish policy and define priorities. Because laws are not self-executing, their enforcement obviously cannot be separated from policy considerations. The Constitution contemplates that the Attorney General should be subject to policy direction from the President. As stated by the Supreme Court: "The Attorney General is . . . the hand of the President in taking care that the laws of the United States . . . be faithfully executed." Removing the Attorney General from the President's control would make him unaccountable to the President, who is constitutionally responsible for his actions.<sup>515</sup>

Finally, Bell went on to argue that any limitation on the president's power to remove the Attorney General, even if self-imposed by executive order, "would be restricting [the president's] ability to fulfill his constitutional responsibility to ensure that the laws be faithfully executed. That constitutional responsibility for the execution of the laws cannot be waived."<sup>516</sup> Thus, Bell concluded, "there is no method, short of a constitutional amendment, to separate the Attorney General from Presidential control."<sup>517</sup> That Carter was willing to embrace these arguments despite his campaign promise to take the contrary approach is further evidence that he supported the idea of a unitary executive at least to some extent. But to some degree, the Carter Administration's ability to resist

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512. *Id.* at 75.

513. 272 U.S. 52 (1926).

514. 1 Op. Off. Legal Counsel at 76.

515. *Id.* (alterations in original) (citation omitted) (quoting *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1921)).

516. *Id.* at 77.

517. *Id.* See generally EASTLAND, *supra* note 6, at 43-44.

encroachments on presidential authority to execute the laws was limited by the shadow of Watergate, as is demonstrated by the fate of the Administration's constitutional objections to a troika of ethics-reform proposals enacted over a two-week span in 1978.

The first big piece of reform legislation passed was the Ethics in Government Act of 1978,<sup>518</sup> which created a regime of judicially appointed special prosecutors to investigate and prosecute high-level wrongdoing in the executive branch. This was a watered-down version of the unconstitutional idea of making the whole Justice Department an independent agency.<sup>519</sup> With respect to this Act, John Harmon, Carter's Assistant Attorney General for the Office of Legal Counsel, suggested that the provision of the Act that vested the power to remove special prosecutors in a special panel of the D.C. Circuit raised "serious constitutional questions."<sup>520</sup> In addition, there were serious questions about the need for such a statute. When allegations of presidential misconduct had surfaced regarding a money-laundering scheme involving the Carter peanut warehouse, Attorney General Griffin Bell had appointed his own special prosecutor, subject to his supervision and removal. This special prosecutor had then successfully completed his investigation in an exemplary manner that enjoyed widespread public confidence.<sup>521</sup> This arguably suggested that no regime of judicially-appointed special prosecutors was needed.<sup>522</sup> Indeed, over time, Jimmy Carter's Justice Department and his two Attorneys General were to emerge as leading critics of the Ethics in Government Act of 1978.<sup>523</sup>

Assistant Attorney General Harmon's discussion of the removal provisions is a study in lawyerly circumspection, noting that the Justice Department had no objections to the provisions.<sup>524</sup> Harmon observed that under *Myers*, Congress may not ordinarily impose limits on the president's power to remove, and he said it was not altogether clear whether the *Humphrey's Executor* exception to *Myers* applied to special prosecutors.

518. Pub. L. No. 95-521, 92 Stat. 1824 (codified at 5 U.S.C. app. §§ 101-505 (2000)).

519. GRIFFIN B. BELL & RONALD J. OSTROW, *TAKING CARE OF THE LAW* 28 (1982).

520. *Special Prosecutor Legislation: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong. 19 (1977) (testimony of John Harmon) [hereinafter Harmon Testimony]. Congress responded in part to this concern by amending the legislation to place the removal power in the Attorney General but prohibiting such removals except for "extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties." § 596, 92 Stat. at 1872; see also EASTLAND, *supra* note 6, at 145 n.6; FISHER, *CONSTITUTIONAL CONFLICTS*, *supra* note 380, at 77; FISHER & DEVINS, *supra* note 475, at 145-46.

521. Harmon Testimony, *supra* note 520, at 19.

522. See S. REP. NO. 97-496, at 5 (1982), reprinted in 1982 U.S.C.A.N. 3537, 3541.

523. See 1999 Senate Committee Hearings, *supra* note 433, at 28-30 (testimony of former Attorney General Griffin B. Bell); Benjamin R. Civiletti, *Post-Watergate Legislation in Retrospect*, 34 SW. L.J. 1043, 1052-56 (1981); *A Roundtable Discussion on the Independent Counsel Statute*, 49 MERCER L. REV. 457, 465-65 (1998) (comments of former Attorney General Griffin B. Bell).

524. Harmon Testimony, *supra* note 520, at 19-21.

Despite his Justice Department's misgivings about judicially appointed special prosecutors, Carter had little choice but to overlook the constitutional problems and sign the independent-counsel bill into law.<sup>525</sup> In the wake of Watergate and the criminal convictions of two of Richard Nixon's Attorneys General, there was an extraordinary need to restore public confidence in the government. For these reasons, the Justice Department was willing to experiment with limited unconstitutional restraints on the president's removal power.<sup>526</sup> This experiment was a mistake by the Carter Administration, but it must be seen in light of the fact that the Administration fought very hard and largely successfully to preserve presidential control over the Department of Justice in the face of a hostile Congress. The Ethics in Government Act was a small price to pay for the greater goal of preventing a post-Watergate Congress from turning the whole Justice Department into an independent agency.

The second big piece of reform legislation was the Inspector General Act of 1978, which vested the existing audit and investigative authority previously held by each of the executive departments in an independent Office of Inspector General.<sup>527</sup> Each Inspector General was required to report the results of such audits or investigations to the head of the department and to make general reports to Congress on a semi-annual basis.<sup>528</sup> The statute also required that the president communicate the reasons for removing any inspector general to both houses of Congress.<sup>529</sup>

John Harmon denounced this legislation as making "the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches, in violation of the doctrine of separation of powers."<sup>530</sup> For example, he believed that the provision requiring that the inspectors general report directly to Congress impermissibly interfered with the president's authority to control the execution of the laws. As the opinion pointed out:

Article II vests the executive power of the United States in the President. This includes general administrative control over those executing the laws. The President's power of control extends to the entire executive branch, and includes the right to coordinate and

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525. See Ethics in Government Act of 1978: Remarks on Signing S. 555 into Law (Oct. 26, 1978), in 1978 PUB. PAPERS 1854; Ethics in Government: Message to the Congress (May 3, 1977), in 1977 PUB. PAPERS 786, 788.

526. *Public Officials Integrity Act of 1977; Blind Trusts and Other Conflicts of Interest Matters: Hearings Before the Senate Comm. on Governmental Affairs*, 95th Cong. 15-17 (1977). See generally EASTLAND, *supra* note 6, at 57-58.

527. Pub. L. No. 95-452, § 3(b), 92 Stat. 1101, 1102.

528. § 5(a)-(b), 92 Stat. at 1103, *reprinted in* 5 U.S.C. app. at 16-17 (2000).

529. § 3(b), 92 Stat. at 1102, *reprinted in* 5 U.S.C. app. at 13 (2000).

530. 1 Op. Off. Legal Counsel 16, 17 (1977).



supervise all replies and comments from the executive branch to Congress.<sup>531</sup>

Moreover, the requirement that the President provide Congress with reasons for any removal of an inspector general constituted "an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers."<sup>532</sup> Although the opinion acknowledged the exception created by *Humphrey's Executor* and *Wiener* for quasi-judicial or quasi-legislative officers, "the power to remove a subordinate appointed officer within one of the executive departments is a power reserved to the President acting in his discretion."<sup>533</sup> Furthermore, the opinion stated that the Inspector General Act violated the unitariness of the executive branch by authorizing the comptroller general to prescribe the audit standards that would apply to the executive branch.<sup>534</sup>

The third big piece of reform legislation was the Civil Service Reform Act of 1978,<sup>535</sup> which grew out of a bill submitted by Carter proposing that the Civil Service Commission be replaced by two newly created agencies. The Commission's administrative responsibilities would be transferred to the Office of Personnel Management (OPM), while its appellate functions would be vested in the Merit Systems Protection Board (MSPB), and its investigatory functions would be lodged in an Office of Special Counsel within the MSPB. While this legislation was pending before Congress, Carter issued a reorganization plan<sup>536</sup> and an executive order<sup>537</sup> largely implementing his legislative proposals.

When Congress enacted the Civil Service Reform Act, it retained the same standard for dismissal that existed in previous statutes, allowing

531. *Id.* (citing *Myers v. United States*, 272 U.S. 52, 163-64 (1926); *Cong. Constr. Corp. v. United States*, 314 F.2d 527, 530-32 (Ct. Cl. 1963)). The opinion also noted:

[T]he Justice Department has repeatedly taken the position that continuous oversight of the functioning of executive agencies, such as that contemplated by the requirement that the Inspector General keep Congress fully and currently informed, is not a proper legislative function. In our opinion, such continuing supervision amounts to an assumption of the Executive's role of administering or executing the laws.

*Id.* By providing for unlimited access to executive branch materials, the bill also risked infringing upon executive privilege. *Id.* at 18.

532. *Id.* at 18.

533. *Id.*; see also FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 78.

534. See Charles J. Williams III, Comment, *The New Separation of Powers Jurisprudence and the Controller General: Does He "Execute the Law" Under the Federal Employees' Retirement Act?*, 9 GEO. MASON L. REV. 35, 41 (1986) (citing H.R. REP. NO. 95-584, at 12 (1977)).

535. Pub. L. No. 95-454, 92 Stat. 1111.

536. Reorg. Plan No. 2 of 1978, 3 C.F.R. 323 (1978), *reprinted in* 5 U.S.C. § 1101 app. at 1577 (1994), and 92 Stat. 3783 (1978).

537. Exec. Order No. 12,107, 3 C.F.R. 264 (1978), *reprinted in* 5 U.S.C. § 1101 (2000).

removals “only for such cause as will promote the efficiency of the service.”<sup>538</sup> It added a list of prohibited personnel practices, including, among other things, discrimination, political coercion, nepotism, and retaliation against whistleblowers.<sup>539</sup> In an apparent desire to limit the range of adverse action that would be reversed on appeal,<sup>540</sup> the Civil Service Reform Act also scaled back some of the procedural protections promulgated by the Civil Service Commission in the aftermath of *Arnett v. Kennedy*.<sup>541</sup> It also provided for broader judicial review of adverse personnel decisions by giving the courts jurisdiction to overturn MSPB decisions that were arbitrary or capricious, obtained without the applicable procedural protections, or unsupported by substantial evidence.<sup>542</sup> The statute did contain provisions exempting all officials who were appointed by the president; who were confirmed by the Senate; who served in the foreign service or for the Central Intelligence Agency; or who were determined by the president, an agency head, or OPM to occupy positions “of a confidential, policy-determining, policy-making or policy-advocating character.”<sup>543</sup> By exempting all policymaking personnel, this provision in effect limited the scope of the Civil Service Reform Act to purely ministerial officials. As such, it did not represent a significant derogation from the unitariness of the executive branch.

There were other provisions of the Civil Service Reform Act of 1978, however, that were more problematic. Unlike the Civil Service Act of 1883, which made Civil Service Commissioners removable by the president at will, and in contrast to the president’s initial proposal, which was silent on the point and presumably would have allowed for unfettered removal of MSPB members, the version of the Civil Service Reform Act actually adopted provided that MSPB members “may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.”<sup>544</sup> In addition, the statute extended the same removal protections to the Office of Special Counsel charged with investigating wrongful terminations.<sup>545</sup> Harmon challenged the removal provisions, pointing out that “the functions of the Special Counsel would be predominantly executive in character. . . . [S]ince he will be performing largely executive functions, [OLC] believe[s] that

538. 5 U.S.C. § 7513(a) (2000). As was the case with the predecessor statutes, the legislative history provides no help in interpreting this provision. See Stephen G. Vaskov, *Judicial Review of Dismissals of Civil Service Employees for Off-Duty Misconduct: The Approach of the Federal Circuit*, 34 AM. U. L. REV. 439, 458 (1985).

539. 5 U.S.C. § 2302(b)(1)–(3), (6)–(8) (2000).

540. See S. REP. NO. 95-969, at 55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2777; Brewer v. USPS, 647 F.2d 1093, 1097 (Ct. Cl. 1981).

541. 416 U.S. 134 (1974). For a review of these expanded protections, see Buffon, *supra* note 285, at 212–23.

542. 5 U.S.C. § 7703(c) (2000).

543. *Id.* § 7511(b).

544. *Id.* § 1202(d).

545. *Id.* § 1211.

Congress may impose no restrictions on the President's power to remove him."<sup>546</sup>

However, when the area of the executive branch being scrutinized by Congress did not relate so directly to ethical abuses by the executive branch, Carter was better able to defend the president's authority to execute the laws. In 1978, Carter vetoed a bill that would have required three Cabinet officers to report to Congress whenever the president's budget requests for certain activities were less than the amounts authorized by Congress and to explain why the higher amounts were not requested.<sup>547</sup> Calling it an "unacceptable intrusion" on his obligations and ability to make budget recommendations, Carter refused to comply.<sup>548</sup> Moreover, the following year Carter refused to comply with a rider barring him from closing ten specified United States consulates,<sup>549</sup> announcing in a signing statement that he would treat the rider as a "recommendation and not a requirement."<sup>550</sup>

Carter did not hesitate to intervene directly in legal matters of personal concern, dictating the Administration's position in *Bakke*<sup>551</sup> and overruling Bell's objection to the use of public funds to pay the salaries of employees of church schools.<sup>552</sup> The Carter Administration also centralized its control over federal litigation, emphasizing the "Attorney General's plenary power over governmental litigation."<sup>553</sup> Toward this end, Carter created the Federal Legal Council to facilitate "coordination and communication among Federal legal offices" in order to "avoid inconsistent or unnecessary litigation by agencies."<sup>554</sup>

546. Letter from John Harmon, Assistant Attorney General, Office of Legal Counsel, to Sen. Abraham Ribicoff, Chairman of the Senate Committee on Governmental Affairs 6 (June 14, 1978), *quoted in* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 340 (1993).

547. Veto of the Sikes Act Amendments of 1978: Message to the House of Representatives Returning H.R. 10882 Without Approval (July 10, 1978), in 1978 PUB. PAPERS 1250, 1250.

548. *Id.*; *see also* FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 192.

549. Act of Aug. 15, 1979, Pub. L. No. 96-60, § 108, 93 Stat. 395, 397.

550. Department of State, International Communication Agency, and Board for International Broadcasting Appropriations Bill: Statement on Signing H.R. 3363 into Law (Aug. 15, 1979), in 1979 PUB. PAPERS 1434, 1434. Carter closed seven of the ten protected consulates by early the following year. 126 CONG. REC. 21,515-16, 28,513 (1980); *see also* May, *supra* note 302, at 967.

551. *See* Devins, *supra* note 159, at 285 (citing *inter alia* BELL & OSTROW, *supra* note 519, at 29-32; FISHER & DEVINS, *supra* note 475, at 266-68); Kristen A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1085 (1994).

552. *See* Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 449 n.223 (1993) (citing BELL & OSTROW, *supra* note 519, at 24-28).

553. 4A Op. Off. Legal Counsel 233, 234 (1980). It should be noted that Carter did permit the agencies to present their own views before the Supreme Court. *See* Devins, *supra* note 159, at 289.

554. Exec. Order No. 12,146, 3 C.F.R. 409, 410 (1979); *see also* Devins, *supra* note 159, at 266, 268-69; Harvey, *supra* note 159, at 1584.

Carter also continued his predecessors' practice of opposing the legislative veto<sup>555</sup> as an unconstitutional infringement of the president's exclusive authority to execute ongoing federal programs.<sup>556</sup> Carter protested that the legislative veto had "the potential of involving Congress in the execution of the laws, a responsibility reserved for the President under the Constitution." Therefore, in signing one bill with such a veto, Carter noted his "intention to preserve the constitutional authority of the President."<sup>557</sup> A month later, Carter even more explicitly based his objection on the unitariness of the executive branch by adding a key word to the language he used in his signing statement. The execution of the laws, according to his statement, was "a responsibility reserved *exclusively* to the President under the Constitution."<sup>558</sup>

Moreover, in a general message to Congress issued on June 21, 1978, Carter issued a sweeping condemnation of all legislative vetoes. In Carter's eyes, legislative vetoes unconstitutionally "inject[ed] the Congress into the details of administering substantive programs and laws." Such congressional participation in the execution of the laws violated the Take Care Clause by "infring[ing] on the Executive's constitutional duty to faithfully execute the

555. During the late 1970s, Congress extended the legislative veto into a wide range of new areas, including the war power, national emergencies, impoundment, presidential papers, and federal salaries. See Fisher, *Legislative Veto*, *supra* note 96, at 284. In 1977, the House considered a proposal similar to the one that passed the House during the Ford Administration that would have subjected *all* agency regulations to a legislative veto. See Dixon, *supra* note 449, at 432 n.29.

556. For a summary of President Carter's positions on legislative vetoes, see Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 829-31 (1984). See also Dixon, *supra* note 449, at 431-32 nn.27-29; Fisher, *Legislative Vetoes*, *supra* note 96, at 284-85. For lists of President Carter's signing statements opposing the legislative veto, see William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 701 n.7, 718-19 (1991); May, *supra* note 302, at 934-35.

557. International Security Assistance Act of 1977: Statement on Signing H.R. 6884 into Law (Aug. 5, 1977), in 1977 PUB. PAPERS 1431, 1432.

558. Presidential War Powers Bill: Statement on Signing H.R. 7738 into Law (Dec. 28, 1977), in 1977 PUB. PAPERS 2186, 2187 (emphasis added). President Carter also repeated his objection based on Article I, Section 7, of the Constitution. *Id.* For other protests based on Article I, Section 7, see International Security and Development Cooperation Act of 1980: Statement on Signing H.R. 6942 into Law (Dec. 16, 1980), in 1980-81 PUB. PAPERS 2813; Civil Rights of Institutionalized Persons Act: Statement on Signing H.R. 10 into Law (May 23, 1980), in 1980-81 PUB. PAPERS 965; Department of State, International Communication Agency, and Board for International Broadcasting Appropriations Bill: Statement on Signing H.R. 3363 into Law (Aug. 15, 1979), in 1979 PUB. PAPERS 1434, 1434-35; National Parks and Recreation Act of 1978: Statement on Signing S. 791 into Law (Nov. 10, 1978), in 1978 PUB. PAPERS 1999, 2000; International Navigational Rules Act of 1977: Statement on Signing H.R. 186 into Law (July 28, 1977), in 1977 PUB. PAPERS 1374, 1375; see also Nuclear Non-Proliferation Act of 1978: Statement on Signing H.R. 8638 into Law (Mar. 10, 1978), in 1978 PUB. PAPERS 500, 502 (challenging whether Congress could "overturn authorized executive actions through procedures not provided in the Constitution").

laws."<sup>559</sup> Although Carter noted that "the Attorney General [was] seeking a definitive judgment" on the constitutionality of legislative vetoes, Carter noted that "no immediate resolution is in prospect."<sup>560</sup> Therefore, Carter urged Congress not to include legislative vetoes in future legislation and informed Congress that he would treat all extant legislative vetoes as "report and wait" provisions. Furthermore, Carter worried that "if Congress subsequently adopts a resolution to veto an Executive action, we will give it serious consideration, but we will not, under our reading of the Constitution, consider it legally binding."<sup>561</sup>

As promised, Carter thereafter determinedly opposed legislative vetoes, refusing to sign at least two bills because they contained legislative vetoes<sup>562</sup> and announcing in numerous signing statements his intention to treat legislative vetoes as "report and wait" requirements.<sup>563</sup> Moreover, the Carter

559. Legislative Vetoes: Message to the Congress (June 21, 1978), in 1978 PUB. PAPERS 1146, 1147. Furthermore, legislative vetoes unconstitutionally "authorize[d] Congressional action that has the effect of legislation while denying the President the opportunity to exercise his veto," effectively "circumvent[ing] the President's role in the legislative process established by Article I, Section 7 of the Constitution." *Id.* Carter also objected to legislative vetoes on policy grounds, pointing out that they contributed to administrative delays, tended to politicize the administrative process, and gave agencies incentive to rely on case-by-case adjudication rather than issuing clear, uniform rules. *Id.* at 1147-48. Carter did acknowledge one major exception to his position: Legislative vetoes contained in reorganization acts do "not involve Congressional intrusion into the administration of on-going substantive programs, and [they] [preserve] the President's authority because he decides which proposals to submit to Congress. The Reorganization Act jeopardizes neither the President's responsibilities nor the prerogatives of Congress." *Id.* at 1147; see also 43 Op. Att'y Gen. 10 (1977); Dixon, *supra* note 449, at 431-32 & n.27 (citing Letter from Griffin Bell to President Carter (Jan. 31, 1977), reprinted in H.R. REP. NO. 95-105, at 10-11 (1977), and in 1977 U.S.C.C.A.N. 41, 49-51); Letter from John Harmon to Sen. Abraham Ribicoff (Feb. 14, 1977); Letter from John Harmon to Rep. Joshua Eilberg (Apr. 1, 1977)). Therefore, Carter entered no objection when signing the Reorganization Act of 1977, Pub. L. No. 95-17, § 2, 91 Stat. 29, 29 (codified as amended at 5 U.S.C. § 901 (2000)). See FISHER & DEVINS, *supra* note 475, at 124-25, 136-37; Quint, *supra* note 556, at 830 n.233.

560. Legislative Vetoes, *supra* note 559, at 1147.

561. *Id.* at 1149. To say that the legislative veto is unconstitutional is not to give the President license to ignore the wishes of Congress. The day after Carter's Message to the Congress was issued, Attorney General Griffin Bell and White House Adviser Stuart Eizenstat each emphasized that, although the President could not be bound by a legislative veto as a constitutional matter, as a matter of comity the President nonetheless had every reason to accommodate the interests of Congress whenever possible. Fisher, *Legislative Veto*, *supra* note 96, at 285; see also 4A Op. Off. Legal Counsel 55, 55, 56, 58 (1980); May, *supra* note 302, at 981. As Carter discovered throughout his tenure, the President disregards congressional politics at his own risk.

562. See, e.g., Veto of the Navajo and Hopi Relocation Bill: Memorandum of Disapproval of H.R. 11092 (Nov. 2, 1978), in 1978 PUB. PAPERS 1925; Veto of Legislation Requiring a Study of Health Effects of Dioxin Exposure: Message to the Senate Returning S. 2096 Without Approval (Jan. 2, 1980), in 1980-81 PUB. PAPERS 4.

563. Federal Insecticide, Fungicide and Rodenticide Act Extension: Statement on Signing H.R. 7018 Into Law (Dec. 17, 1980), in 1980-81 PUB. PAPERS 2814, 2815; National Historic Preservation Act Amendments of 1980: Statement on Signing H.R. 5496 Into Law (Dec. 12, 1980), in 1980-81 PUB. PAPERS 2802, 2803; Coastal Zone Management Improvement Act of

Administration, like the Ford Administration, challenged the constitutionality of the legislative veto in court.<sup>564</sup> These challenges were of more than passing interest to the President. In two separate signing

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1980: Statement on Signing S. 2622 Into Law (Oct. 18, 1980), in 1980-81 PUB. PAPERS 2335, 2335; Marine Protection, Research, and Sanctuaries Appropriations Bill: Statement on Signing S. 1140 Into Law (Aug. 29, 1980), in 1980-81 PUB. PAPERS 1592, 1592; International Development and Food Assistance Act of 1978: Statement on Signing H.R. 12222 Into Law (Oct. 6, 1978), in 1978 PUB. PAPERS 1721, 1721; Amtrak Improvement Act of 1978: Statement on Signing S. 3040 Into Law (Oct. 5, 1978), in 1978 PUB. PAPERS 1718, 1718; Outer Continental Shelf Lands Act Amendments of 1978: Statement on Signing S. 9 Into Law (Sept. 18, 1978), in 1978 PUB. PAPERS 1530, 1531; see also National Parks and Recreation Act Amendments: Statement on Signing H.R. 3757 Into Law (Mar. 5, 1980), in 1980-81 PUB. PAPERS 432, 433 (instructing the Secretary of the Interior to regard the committee veto "as advisory only"); Presidential War Powers Bill, *supra* note 558, at 2187 (issued prior to Message of June 21, 1978) (indicating that a legislative veto would be treated as a "notify and wait" provision). In three statements, President Carter specifically stated that congressional attempts to exercise a legislative veto would be given serious consideration but not regarded as legally binding. Marine Protection, Research, and Sanctuaries Appropriations Bill, *supra*, at 1592; Coastal Zone Management Improvement Act of 1980, *supra*, at 2335; Federal Insecticide, Fungicide and Rodenticide Act Extension, *supra*, at 2815.

Four other signing statements effectively took the same position without referring directly to the Message of June 21, 1978. See National Parks and Recreation Act of 1978, *supra*, at 2000 (directing the Secretary of Agriculture to report actions to Congress and to "listen to any concerns which may be expressed by the specified congressional committees" with the understanding that the Secretary may consummate any actions without committee approval); Civil Rights of Institutionalized Persons Act, *supra* note 558, at 965 (directing the Attorney General to "carefully consider any congressional views that are expressed" without "treat[ing] any resolution of 'disapproval' as binding").

564. The Carter Administration questioned the constitutionality of the legislative veto before the Supreme Court. Brief of the Appellees at 26 n.11, *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) (No. 75-1605). However, the Court declined to reach the question, noting only that "[w]hatever are the future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." 433 U.S. at 444-45. The Carter Administration also backed challenges to the legislative veto in several courts of appeals, with mixed results. See *Fisher, Interpretation Outside the Courts*, *supra* note 96, at 82; *Fisher, Legislative Veto*, *supra* note 96, at 284. Compare *Chadha v. INS*, 634 F.2d 408, 415 (9th Cir. 1980), *aff'd*, 462 U.S. 919, 959 (1983) (striking down legislative veto), and *McCorkle v. United States*, 559 F.2d 1258, 1262 (4th Cir. 1977) (same), with *Atkins v. United States*, 556 F.2d 1028, 1063 (Ct. Cl. 1977) (upholding legislative veto).

The Carter Administration did face some problems framing the legislative veto as an issue in a justiciable controversy. Even though President Carter instructed the Secretary of Agriculture in 1978 that he should proceed without following a certain legislative veto provision, National Parks and Recreation Act of 1978, *supra* note 563, at 2000, the Justice Department concluded that "in spite of the President's direction, the Department [of Agriculture] and the Forest Service should cooperate with . . . the Congress" and advised the Department of Agriculture that it could voluntarily comply with the legislative veto provision as a matter of policy. May, *supra* note 302, at 945 (quoting *Additions to the National Wilderness Preservation System: Hearings Before the Subcomm. On Public Lands of the House Comm. On Interior and Insular Affairs*, 96th Cong. 244-45 (1979)). The Department of Agriculture ordered the Forest Service "to proceed as if [the legislative veto provision] were applicable," the President's instructions notwithstanding. *Id.* The Forest Service complied with the Department's orders. *Id.*

statements, he mentioned his intent to bring a judicial challenge to the legislative veto.<sup>565</sup> Moreover, after the Ninth Circuit struck down the legislative veto,<sup>566</sup> Carter issued a statement applauding the decision and urging the Attorney General to "seek[] Supreme Court review of the decision as soon as possible."<sup>567</sup>

In fact, the Carter Administration even went so far as to ignore Congress's attempt to exercise a legislative veto over a series of education regulations.<sup>568</sup> Carter's second Attorney General, Benjamin Civiletti, advised the Secretary of Education that the legislative veto provision violated the Constitution and that the Secretary was "entitled to implement the regulations in question in spite of Congress' disapproval."<sup>569</sup> Civiletti concluded, "[O]nly the executive branch can execute the statutes of the United States."<sup>570</sup> To recognize the legislative veto "as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions."<sup>571</sup> As a result, "once a function has been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation."<sup>572</sup>

Despite Congress's insistence that the Attorney General abide by the legislative veto provision,<sup>573</sup> the Secretary of Education followed Civiletti's

565. Legislative Vetoes, *supra* note 559, at 1147; Federal Trade Commission Improvements Acts of 1980: Statement on Signing H.R. 2313 Into Law (May 28, 1980), in 1980-81 PUB. PAPERS 982, 983.

566. *Chadha v. INS*, 634 F.2d 408, 415 (9th Cir. 1980), *aff'd*, 462 U.S. 919, 959 (1983).

567. *Chadha v. Immigration and Naturalization Service*: Statement on the Ninth Circuit Court of Appeals Decision (Dec. 24, 1980), in 1980-81 PUB. PAPERS 2836.

568. Like Nixon and Ford, Carter refused to follow the legislative veto procedures required by the War Powers Resolution. However, Carter opposed the provisions as an infringement of his powers as Commander in Chief, rather than his exclusive power to execute the laws. *A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings Before the Senate Comm. On Foreign Relations*, 95th Cong. 322 (1977); see also John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1381 & n.8 (1988); May, *supra* note 302, at 974-75.

569. 4A Op. Off. Legal Counsel 21, 22 (1980).

570. *Id.* at 29. The executive branch had a duty to execute the law faithfully. However, the Attorney General pointed out, the "duty to enforce the fundamental law set forth in the Constitution" at times overrides the "duty to enforce the law founded in the Acts of Congress." Because the legislative veto "intrude[d] upon the constitutional prerogatives of the Executive," the present case was such a time. *Id.* at 29.

571. *Id.*

572. *Id.* at 27.

573. May, *supra* note 302, at 978 n.541 (citing Letter from Benjamin R. Civiletti to Sen. Max Baucus (July 30, 1980), reprinted in *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong. 745 (1985)).

advice and implemented the regulations.<sup>574</sup> Therefore, although the Carter Administration did tolerate the enactment of a few legislative vetoes without comment,<sup>575</sup> it is clear that Carter defended the unitariness of the executive branch by firmly opposing the legislative veto.

Carter did not merely react to congressional attempts to control the execution of the laws: He also proactively asserted his control over the executive branch by continuing the Nixon-Ford program of OMB review of proposed regulations.<sup>576</sup> Upon assuming office, Carter ordered agencies to continue to analyze the inflationary impact of regulations and directed them to give more detailed consideration to the economic cost of regulations as well. Carter supplemented these directives the following year with an executive order entitled "Improving Government Regulations"<sup>577</sup> that far exceeded previous regulatory review efforts. This program required that executive agencies include a "Regulatory Analysis" in all important proposals, outlining the alternatives considered by the agency and explaining why the agency chose that particular alternative.<sup>578</sup> The order also required that "agencies . . . publish at least semiannually an agenda of significant regulations under development or review."<sup>579</sup> The order cited no specific authority as its basis, relying simply on Carter's authority as President of the United States.<sup>580</sup> Although the initial draft of the order clearly contemplated that it would apply to the independent agencies as well

574. 45 Fed. Reg. 22634, 22742, 23602, 27880 (Apr. 3, 7, 24, 1980) (codified at 45 C.F.R. §§ 100d, 134, 161c, 161g (1980)); see also May, *supra* note 302, at 975-76. Congress did not give up without a fight. The House attempted to enforce its legislative veto by adding an amendment to two key appropriations bills providing that "none of the funds appropriated . . . by this Act shall be available to implement, administer, or enforce any regulation" that had been vetoed by Congress. 126 CONG. REC. 19,312 (1980) (reporting the House enactment of the Levitas amendment to H.R. 7584, 96th Cong. (1980)); *id.* at 20,507 (House enactment of Levitas amendment to H.R. 7591, 96th Cong. (1980)). The Office of Legal Counsel responded with an opinion condemning the amendments as an attempt by Congress to place indirect restrictions on the President that, if placed directly, would violate the Constitution. 4B Op. Off. Legal Counsel 731, 733-34 (1980).

575. See FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 143 (noting the acceptance of legislative vetoes in legislation governing the FTC and the Federal Election Commission); LOUIS FISHER, THE POLITICS OF SHARED POWER 94-95, 106 (1981) (noting acceptance of legislative-veto provisions relating to arms sales, war powers, and gasoline rationing); Quint, *supra* note 556, at 829-30 n.232 (citing STAFF OF HOUSE COMM. ON RULES, 96TH CONG., STUDIES ON THE LEGISLATIVE VETO 2 (Comm. Print 1980)) (noting OMB support for legislative veto in the Impoundment Control Act); Strauss, *supra* note 5, at 580 n.20 (noting acceptance of legislative vetoes in legislation governing the FTC).

576. For a general description of the Carter Administration's regulatory review program, see Bruff, *supra* note 473, at 547-49; Percival, *supra* note 387, at 142-47; DeWitt, *supra* note 387, at 771-72.

577. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

578. *Id.* § 6, 3 C.F.R. at 156.

579. *Id.* § 2(a), 3 C.F.R. at 153.

580. *Id.* pmbi., 3 C.F.R. at 152; see also Bruff, *supra* note 388, at 465 n.69.



as the executive departments,<sup>581</sup> Carter decided in the end to avoid a "confrontation with Congress over the applicability of the order to the independent regulatory agencies"<sup>582</sup> and opted instead to simply ask the chairmen of the commissions to comply with the Order's procedures voluntarily.<sup>583</sup>

Carter supplemented that order by creating the Regulatory Analysis Review Group (RARG) to conduct an intensive review of ten to twenty major regulations a year and to submit its findings during those regulations' public comment periods. Carter also created a Regulatory Council charged with keeping a calendar of forthcoming significant regulatory proposals and using it to identify and mediate interagency conflicts.<sup>584</sup> Further, the Carter Administration issued a circular laying out procedures for coordinating and clearing agencies' legislative recommendations.<sup>585</sup> Finally, in 1980 Congress enacted two statutes that further strengthened OMB's control over agency regulations. The Regulatory Flexibility Act required agencies to analyze the impact of their regulations on small businesses,<sup>586</sup> the Paperwork Reduction Act required that OMB review and clear all information collection requests and created the Office of Information and Regulatory Affairs (OIRA) to conduct regulatory reviews.<sup>587</sup> In addition, the Executive Office of the President reviewed a large number of the proposed regulations and intervened directly in numerous regulatory decisions.<sup>588</sup>

Like the Quality of Life Review of the Nixon and Ford Administrations, Carter's program stopped short of centralized supervision of the rulemaking process. Although the President and OMB gave some guidance as to which

581. The initial draft of Executive Order No. 12,044 was ambiguous as to whether it applied to independent agencies, and the notice accompanying it sought public comment about whether it should be so applied. 42 Fed. Reg. 59,740 (Nov. 19, 1977). Carter was apparently advised that it had the authority to do so. Strauss, *supra* note 5, at 592-93 n.20; see also ABA COMM'N ON LAW & THE ECON., *supra* note 473, at 85; Bruff, *supra* note 388, at 499. See generally Moreno, *supra* note 105, at 494-95.

582. 43 Fed. Reg. 12,670 (Mar. 24, 1978).

583. Improving Government Regulations: Letter to the Heads of Independent Regulatory Agencies (Mar. 23, 1978), in 1978 PUB. PAPERS 563, 564; see also Frank B. Cross, *The Surviving Significance of the Unitary Executive*, 27 HOUS. L. REV. 599, 706 (1990).

584. Memorandum for the Heads of Executive Departments and Agencies, Subject: Strengthening Regulatory Management (Oct. 31, 1978), in 1978 PUB. PAPERS 1905, 1905; see also LAWRENCE J. WHITE, *REFORMING REGULATION: PROCESSES AND PROBLEMS* 21-22 (1981).

585. OMB Circular A-19 (Sept. 20, 1979) (on file with the Iowa Law Review). This circular on its face applied to the independent regulatory commissions, although it should be noted that several of the commissions' organic statutes provided that the commissions were not subject to OMB circulars. Moreno, *supra* note 105, at 490.

586. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980).

587. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812. This office was to become a key bulwark of the unitary executive during the Reagan years.

588. See WHITE, *supra* note 584, at 220-21; Cross, *supra* note 471, at 495; Kenneth Culp Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. 849, 851 (1982); Percival, *supra* note 387, at 146-47 n.112.

rules should be subjected to such analyses and how regulatory analyses should be conducted,<sup>589</sup> the final decisions on those issues were left to the individual agencies.<sup>590</sup> Furthermore, RARG had no authority to block agencies from issuing proposed or final regulations and did not begin its review until after the proposed regulation had been published in the Federal Register.<sup>591</sup> Nonetheless, commentators have generally acknowledged that Carter's regulatory review program did enable the President to increase his control over regulatory policy.<sup>592</sup>

Thus, despite Jimmy Carter's acceptance of certain pieces of post-Watergate legislation that impinged on his authority to execute the laws, on balance Carter emerges as a defender of the unitary executive. The fact that short-term political pressures effectively precluded him from asserting the president's prerogatives on a few occasions does not signify acquiescence in a diminution of the unitary executive for purposes of coordinate construction. Rather, Carter's rejection of Congress's extraordinary attempts to turn the whole Justice Department into an independent agency clearly marks him as another defender of the unitary executive.

#### VIII. RONALD REAGAN

Ronald Reagan was one of the greatest and most controversial presidents of the twentieth century. Although the Reagan presidency is generally regarded as a brilliant success, Reagan's position on the unitary executive was enigmatic. While the Reagan Administration was in power,

589. Exec. Order No. 12,044, § 3(a) & (b), 3 C.F.R. 152, 154 (1979); Memorandum from Wayne G. Grandquist, Associate OMB Director for Management and Regulatory Policy, to the Heads of Departments and Agencies, Regulatory Analysis (Nov. 21, 1978), cited in Bruff, *supra* note 473, at 548; see also Cross, *supra* note 471, at 495 n.62 (citing authorities).

590. Cross, *supra* note 471, at 495 n.63; Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1200 n.8 (1981).

591. Percival, *supra* note 387, at 144-45; Rosenberg, *supra* note 291, at 1200 n.8; DeWitt, *supra* note 387, at 772. The fact that RARG review occurred after a rule had already been proposed marked a significant change from Quality of Life Review, since it prevented reviewers from attempting to influence regulations before they were proposed. Percival, *supra* note 387, at 144-45.

592. WHITE, *supra* note 584, at 221; Cross, *supra* note 471, at 495; Richard M. Neustadt, *The Administration's Regulatory Reform Program: An Overview*, 32 ADMIN. L. REV. 129, 141-42 (1980); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 949 (1980). Carter also exerted his authority by denying procurement contracts to companies that failed to follow "voluntary" wage and price guidelines. Exec. Order No. 12,092, 3 C.F.R. 249 (1979), *revoked by* Exec. Order No. 12,288, 3 C.F.R. 125 (1982). Other similar steps followed. The D.C. Circuit eventually upheld Carter's actions as an exercise of his powers under the general procurement statutes. *AFL-CIO v. Kahn*, 618 F.2d 784, 784-85 (D.C. Cir.) (en banc). Although this conclusion was quite a stretch, in the end it demonstrates that Carter's imposition of wage and price controls was an exercise of statutory authority and not an exercise of the President's power to control the execution of the laws. See Quint, *supra* note 556, at 791-98.

both its supporters and critics thought that the defense of the unitary executive was a key part of Reagan's policy program.<sup>593</sup> Thus, Charles Fried, Reagan's Solicitor General, has written, "The Reagan Administration had a vision about the arrangement of government power: the authority and responsibility of the President should be clear and unitary. The Reagan years were distinguished by the fact that that vision was made the subject of legal, rather than simply political, dispute."<sup>594</sup>

Others have been more equivocal about the depth of Reagan's commitment to the unitary executive. As Reagan's first Attorney General, William French Smith, later wrote:

If there was one area in which the White House was deficient during my years in office, it was in the protection of presidential power. Decisions there were made on the basis of the substance of individual issues. There was no effective concern or review of the impact that issue or the position taken with respect to it would have on presidential power. Nor was there any effort to identify governmental activities elsewhere that, if developed, would adversely affect the province of the executive. Nor, to be candid, was the bully pulpit used to provide leadership or defense of that vital institution.<sup>595</sup>

In support of Smith's criticism, Professors Gary Lawson and Nelson Lund have pointed out that President Reagan never vetoed a bill because it infringed upon presidential power.<sup>596</sup> As with many things, the truth may well lie somewhere in between.<sup>597</sup> Regardless of how deep one thinks Reagan's commitment to the unitary executive ran, it remains clear that Reagan never acquiesced in or agreed to a congressional power to deviate from the unitary executive.

Reagan quickly showed that he "could be ruthless when necessary" on personnel actions,<sup>598</sup> as evidenced by his decision not to give Edwin Meese III, his longtime confidant and the head of his transition team, the job he

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593. See Miller, *supra* note 374, at 410-12; Rosenberg, *supra* note 291, at 628-34; Shane, *supra* note 5, at 596-97.

594. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 133 (1991).

595. Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 38 (quoting WILLIAM FRENCH SMITH, *LAW AND JUSTICE IN THE REAGAN ADMINISTRATION* 222 (1991)).

596. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1245-46 (1994); Lund, *supra* note 595, at 42. But see *infra* notes 607-14 and accompanying text (arguing that Reagan pocket vetoed the Whistleblower Protection Act of 1988 in part to protect the unitariness of the executive).

597. Miller, *supra* note 374, at 401-02 ("In the Reagan years, the picture was mixed, with a resurgent and aggressive presidency, but with Congress not relinquishing the gains it had made."); see also *id.* at 410-12.

598. EDMUND MORRIS, *DUTCH: A MEMOIR OF RONALD REAGAN* 420 (1999).

wanted most: White House Chief of Staff. Instead, that job went to James Baker, formerly of George Bush's presidential campaign, with Meese receiving a free floating White House spot as Counselor to the President. Reagan then made Michael Deaver the third member of his White House troika for the first term, giving him the title of Deputy Chief of Staff.<sup>599</sup> Meese, Baker, and Deaver struggled for preeminence on the White House staff during Reagan's first term. This struggle for preeminence left Reagan able to pick and choose from the policy options that his three subordinates presented to him. The net result was to augment Reagan's power and control.

Reagan was not at all hesitant to use the removal power harshly to further his Administration's goals. Early in the first term, Reagan had his first major cabinet removal crisis when it became clear that Secretary of State Alexander Haig was not working out well. Just as he had been ruthless in picking Baker over Meese as White House Chief of Staff, so too was Reagan ruthless in forcing Haig to resign.<sup>600</sup> Additionally, in his first year in office, Reagan dramatically used his removal power to settle an air-traffic controllers strike by firing the striking air traffic controllers.<sup>601</sup> During his second term, Reagan subtly forced the resignation of his White House Chief of Staff Donald Regan because of Regan's failure to detect the Iran-Contra affair.<sup>602</sup> Reagan also demonstrated his support for the unitary executive by the manner in which he wielded his removal power to displace three members of the United States Commission on Civil Rights in 1983<sup>603</sup> and numerous other officials previously thought to be insulated from presidential control.<sup>604</sup> Although the courts did not always approve of Reagan's removals,<sup>605</sup> the fact that Reagan often used his power to remove officials shows his commitment to the unitary executive.

599. *Id.* at 421.

600. *Id.* at 462-63.

601. *Id.* at 659.

602. *Id.* at 620-22.

603. The statute creating the Commission was silent about removals and established the Commission "in the executive branch of the Government." Civil Rights Act of 1957, Pub. L. No. 85-315, § 101(a), 71 Stat. 634, 634. For a full discussion of the debate over the Commission's supposed "independence," see Entin, *supra* note 208, at 770-76.

604. For other examples of removals instigated by Reagan, see 6 Op. Off. Legal Counsel 1 (1982); 5 Op. Off. Legal Counsel 337 (1981); FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 78-79; Miller, *supra* note 374, at 411 & n.63, 414 n.82.

605. A district court enjoined Reagan from removing the Civil Rights Commissioners. On appeal, the D.C. Circuit subsequently vacated the injunction as moot, since the statutory authorization for the Commission had expired. *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983), *vacated as moot*, 732 F.2d 949 (D.C. Cir. 1983) (per curiam). Congress later reconstituted the Commission, this time requiring specific cause for the removal of its members. United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, § 2(d), 97 Stat. 1301, 1301; see also *Borders v. Reagan*, 518 F. Supp. 250, 268 (D.D.C. 1981) (blocking Reagan's attempted removal of a member of the D.C. Judicial Nomination

Reagan also supported the unitary executive by opposing all three of the post-Watergate ethics statutes reluctantly accepted by the Carter Administration. First, in 1981, Reagan removed a dozen inspectors general without complying with the statutory requirement that he inform Congress of the reasons for his removals. Instead, Reagan simply explained that he wanted inspectors general in whom he had total confidence.<sup>606</sup>

Second, Reagan pocket vetoed the proposed Whistleblower Protection Act of 1988, which would have amended the Civil Service Reform Act in ways that would have derogated from the unitary executive.<sup>607</sup> The Whistleblower Protection Act would have moved the Office of Special Counsel outside the MSPB and turned it into a freestanding independent agency.<sup>608</sup> Other provisions would have given the Office of Special Counsel independent litigating authority that was not subject to coordination by the Justice Department.<sup>609</sup> It would also have authorized the Office of Special Counsel to transmit information to Congress "without review, clearance, or approval by any other administrative authority."<sup>610</sup>

Recalling the concerns first raised by John Harmon,<sup>611</sup> Reagan objected that the Act "creates an Office of Special Counsel and purports to insulate the Office from presidential supervision and to limit the power of the President to remove his subordinates from office."<sup>612</sup> Reagan was also concerned about a second provision that "purport[ed] to prohibit review within the Executive branch of views of the Office of Special Counsel proposed to be transmitted in response to congressional committee requests."<sup>613</sup> These provisions, according to the President, clearly raised "serious constitutional concerns."<sup>614</sup>

But Reagan reserved his sharpest criticism for the section of the bill that would have authorized the Special Counsel to challenge the decisions of the MSPB in court. Permitting two executive agencies to resolve a dispute in court "conflict[ed] with the constitutional grant of the Executive power to

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Commission). *But see* Kalaris v. Donovan, 697 F.2d 376, 401-02 (D.C. Cir. 1983) (upholding removals); Nat'l Treasury Employees Union v. Reagan, 663 F.2d 239, 252-53 (D.C. Cir. 1981) (same).

606. Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Inspector General Appointees of Certain Executive Agencies (Jan. 20, 1981), in 1981 PUB. PAPERS 24, 25; *see also* FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 78.

607. For overviews of the history of this legislation from two very different perspectives, see Kmiec, *supra* note 546, at 340-44; Rosenberg, *supra* note 291, at 662-73.

608. S. 508, 100th Cong. § 1211 (1988), *reprinted in* 134 CONG. REC. 19,974 (1988).

609. *Id.* § 1212.

610. *Id.* § 1217.

611. *See supra* note 546 and accompanying text.

612. Memorandum of Disapproval on a Bill Concerning Whistleblower Protection (Oct. 26, 1988), in 1988-89 PUB. PAPERS 1391, 1392.

613. *Id.*

614. *Id.*

the President which includes the authority to supervise and resolve disputes between his subordinates."<sup>615</sup> Such a provision was antithetical to the theory of the unitary executive.

Third, the Reagan Administration in due time came to oppose the Ethics in Government Act as an unconstitutional infringement on the unitariness of the executive branch. Although the Reagan Administration did not enter any objections when the Ethics in Government Act was first reauthorized in 1983,<sup>616</sup> by the time Congress revisited the issue again in 1987, the Administration began to voice more serious concerns. Assistant Attorney General John R. Bolton challenged the constitutionality of the Act during hearings, arguing that all prosecutors were properly considered executive officers who thus had to be subject to the direction and control of the President.<sup>617</sup> Assistant Attorney General Charles Cooper endorsed Bolton's position.<sup>618</sup>

Reagan concurred, declaring that "[a]n officer of the United States exercising executive authority in the core area of law enforcement necessarily, under our constitutional scheme, must be subject to executive branch appointment, review, and removal. There is no other constitutionally permissible alternative."<sup>619</sup> However, in light of the fact that the matter was being litigated before the D.C. Circuit and "[i]n order to ensure that public confidence in government not be eroded while the courts are in the process of deciding these questions," Reagan chose to "tak[e] the extraordinary step of signing this bill despite [his] very strong doubts about its constitutionality"<sup>620</sup> while at the same time pressing his opposition to the independent counsel statute in the Administration's briefs before the D.C. Circuit and the Supreme Court in the litigation leading up to *Morrison v. Olson*.<sup>621</sup>

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615. *Id.* For a complete description of the Act and particularly sharp criticism of Reagan's pocket veto, see Rosenberg, *supra* note 291, at 662–88. See also Devins, *supra* note 159, at 267–68. For a more sympathetic assessment of Reagan's actions, see Kmiec, *supra* note 546, at 342–43.

616. Ethics in Government Act Amendments, Pub. L. No. 97-409, 96 Stat. 2039 (1983).

617. FISHER & DEVINS, *supra* note 475, at 147, 156–57 (citing *Independent Counsel Amendments Act of 1987: Hearings Before the House Comm. on the Judiciary*, 100th Cong. 429–33 (1987) [hereinafter 1987 House Committee Hearings], and quoting *Oversight of the Independent Counsel Statute: Hearings Before the Senate Comm. on Governmental Affairs*, 100th Cong. 8–9 (1987)).

618. Letter from Charles Cooper, Assistant Attorney General, to Leon Silverman (Mar. 25, 1987), reprinted in 1987 House Committee Hearings, *supra* note 617, at 100.

619. Statement on Signing the Independent Counsel Reauthorization Act of 1987 (Dec. 15, 1987), in 1987 PUB. PAPERS 1524, 1524.

620. *Id.*

621. 487 U.S. 654 (1988). For the Reagan Administration's support for the unitary executive, see Brief for the United States as Amicus Curiae Supporting Appellees at 5–16, 29–41, *Morrison* (No. 87-1279); Brief on Behalf of Amicus Curiae United States, *In re Scaled Case*, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, and 87-5265), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988), reprinted in 16 HOFSTRA L. REV. 97, 101–02, 104, 112–16, 126–30 (1987).

In his brief in the *Morrison* case, Solicitor General Charles Fried argued that the Vesting and Take Care Clauses of Article II demanded that the President be able to control the actions of, and remove, independent counsels. The argument section of Fried's brief began by saying:

Article II, Section 1, of the Constitution declares: "The executive Power shall be vested in a President of the United States of America." Section 3 of the same Article then charges the President with the corresponding duty: "he shall take Care that the Laws be faithfully executed." The independent counsel statute violates the plain meaning of those words by taking an important part of the executive power, and of the concomitant duty to see the faithful execution of the laws, away from the President and assigning it to a person unaccountable to the President in her selection *and* her performance *and* her tenure. The statute vests executive power other than in the President, in direct contravention of Article II, Section 1's "grant of power."<sup>622</sup>

The brief goes on to assert, "Whatever limits Congress may constitutionally impose on the President's various means of holding other officers to account, it may not deny his power to remove purely executive officers like an independent counsel."<sup>623</sup> The brief distinguishes *Humphrey's Executor* and *Wiener* by saying that those cases concerned entities that were quasi-legislative or quasi-judicial unlike here, where the function of prosecuting high-level wrongdoing was a core executive function. All in all, the brief was a ringing defense of the unitary executive, which unfortunately led to a disastrous Supreme Court decision.

The Court in *Morrison v. Olson* divided seven to one, with Chief Justice Rehnquist writing for the Court in upholding the constitutionality of the Ethics in Government Act.<sup>624</sup> The worst part of Rehnquist's decision was his apparent conclusion that even officers performing such core executive functions as prosecution could be insulated from presidential removal.<sup>625</sup> Justice Scalia wrote an eloquent dissent in which he berated the majority not only for its erroneous interpretation of Article II, but also for failing to follow *Humphrey's Executor*, which itself did not purport to apply to core executive functions like prosecution.<sup>626</sup> The Reagan Administration lost the battle in the *Morrison* case. Even though the Administration's arguments

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622. Brief for the United States as Amicus Curiae Supporting Appellees at 5-6, *Morrison* (No. 87-1279) (citing *Myers v. United States*, 272 U.S. 52, 151 (1926)).

623. *Id.* at 29.

624. *Morrison*, 487 U.S. at 659.

625. *Id.* at 688-91.

626. *Id.* at 705-08 (Scalia, J., dissenting). Interestingly, subsequent court decisions have indicated that holdover officials, such as Humphrey, do not fall within the scope of the "for cause" removal provision. See *Swan v. Clinton*, 100 F.3d 973, 988 (D.C. Cir. 1996). It is thus now clear that under modern doctrine *Humphrey's Executor* would have been decided the other way.

failed to convince a majority of the Supreme Court, the fact that the Administration advanced them is sufficient to overcome any claims that the executive branch acquiesced in the institution of the independent counsel as a deviation from the unitary executive. Indeed, many scholars have questioned whether *Morrison* precludes a president from removing a member of an independent agency for failing to follow a presidential policy directive.<sup>627</sup>

Reagan also joined his predecessors in objecting to the legislative veto, which continued to command significant support in Congress.<sup>628</sup> Although Reagan primarily based his attacks on the bicameralism and presentment requirements of Article I, section 7,<sup>629</sup> Reagan also condemned legislative vetoes "because of the potential for involving the Congress in the day-to-day implementation of the law, a responsibility allocated solely to the President under the Constitution."<sup>630</sup> As Reagan further noted:

These provisions can be expected to inject an unnecessarily disruptive element by subjecting proposed programs to disapproval, congressional or even committee, even after they have been examined by the executive branch and found to be compatible with congressionally adopted standards and supportive of the national interests of the United States.<sup>631</sup>

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627. See Lessig & Sunstein, *supra* note 10, at 110–11; Strauss, *supra* note 5, at 615; cf. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5, at 64 (3d ed. 1994) (pointing to criticism of *Humphrey's Executor* in *Freytag v. Commissioner*, 501 U.S. 868 (1991), as suggesting that the issue has not yet been resolved); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4–10, at 254 n.45 (2d ed. 1988) (noting the lack of clarity as to what may constitute proper cause for removal).

628. Much as had occurred during the Ford and Carter Administrations, the Senate had passed legislation that would subject all agency rules to a legislative veto. See FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 142 n.113.

629. See Statement on Signing International Security and Foreign Assistance Legislation (Dec. 29, 1981), in 1981 PUB. PAPERS 1202, 1203; Statement on Signing a Bill Concerning the Establishment of Alcohol Traffic Safety Programs (Oct. 25, 1982), in 1982 PUB. PAPERS 1378; Statement on Signing the Union Station Redevelopment Act of 1981 (Dec. 29, 1981), in 1981 PUB. PAPERS 1207; Statement on Signing a Student Aid Bill (Oct. 14, 1982), in 1982 PUB. PAPERS 1312; Statement on Signing a Bill Amending the Indian Judgment Funds Act (Jan. 12, 1983), in 1983 PUB. PAPERS 44.

630. Statement on Signing International Security and Foreign Assistance Legislation, *supra* note 629, at 1203.

631. *Id.*; see also Statement on Signing a Bill Concerning the Establishment of Alcohol Traffic Safety Programs, *supra* note 629, at 1378 (objecting that the legislative veto "unconstitutionally involves the Congress in the executive functions of promulgating regulations under authority previously conferred, in violation of the principle of separation of powers"); 5 Op. Off. Legal Counsel 294, 297, 301–03 (1981). The Reagan Administration did occasionally allow a legislative veto to be enacted without registering any protest. Act of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, 1870 (extending the legislative veto contained in the FTC Improvements Act of 1990); see also FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 143.



The Reagan Administration backed up its rhetoric by successfully challenging the legislative veto in the Courts of Appeals and by pressing the case before the Supreme Court, in which it argued that the legislative veto impermissibly allows Congress to participate in the execution of the laws.<sup>632</sup> These efforts culminated in the landmark ruling in *INS v. Chadha*<sup>633</sup> holding that the legislative veto violates the bicameralism and presentment requirements of Article I, section 7. The fact that the Supreme Court resolved the case on alternative grounds does not change the import of the Reagan Administration's assertion of the unitary executive for the purposes of coordinate construction. Indeed, Reagan continued his opposition to legislative vetoes in the face of Congress's refusal to follow *Chadha* when Congress continued to pass laws containing legislative vetoes. Reagan's signing statements approving these laws consistently said that the unconstitutional legislative-veto provisions would be ignored.<sup>634</sup>

The Reagan Administration even revived the objections raised by Presidents Woodrow Wilson and Franklin Roosevelt<sup>635</sup> to permitting the Comptroller General to have any role in the execution of the laws. For example, when signing the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act, which gave the Comptroller General the authority to issue sequestration orders that would lead to a series of mandatory budget cuts, Reagan noted that "[u]nder the system of separated powers established by the Constitution, . . . executive functions may only be

632. Brief for the Immigration and Naturalization Service at 44–56, *INS v. Chadha*, 462 U.S. 919 (1983) (No. 80-1832).

633. 462 U.S. 919 (1983).

634. See Statement on Signing the Land Remote-Sensing Commercialization Act of 1984 (July 17, 1984), in 1984 PUB. PAPERS 1052, 1053; Statement on Signing the Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1985 (July 18, 1984), in 1984 PUB. PAPERS 1056, 1057; Statement on Signing a Nuclear Regulatory Commission Appropriations Bill (Oct. 30, 1984), in 1984 PUB. PAPERS 1686; Statement on Signing the Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1986 (Nov. 25, 1985), in 1985 PUB. PAPERS 1419, 1420; Statement on Signing the National Defense Authorization Act for Fiscal Year 1987 (Nov. 14, 1986), in 1986 PUB. PAPERS 1557, 1558; Statement on Signing the Federal Triangle Development Act (Aug. 22, 1987), in 1987 PUB. PAPERS 973, 973–74; Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1989 (Sept. 27, 1988), in 1988–89 PUB. PAPERS 1228; Statement on Signing the Indian Self-Determination and Education Assistance Act Amendments of 1988 (Oct. 5, 1988), in 1988–89 PUB. PAPERS 1284; Statement on Signing a Bill Providing for the Leasing of Property to the District of Columbia Chapter of the American National Red Cross (Nov. 8, 1988), in 1988–89 PUB. PAPERS 1485.

After *Chadha*, the Reagan Administration did enter into some informal agreements with Congress, which served much the same purpose as legislative vetoes. See Fisher, *Legislative Veto*, *supra* note 96, at 286–90; Fisher, *Interpretation Outside the Courts*, *supra* note 96, at 84–91. The fact that the executive branch at times may voluntarily choose to keep Congress informed, however, is not in any way inconsistent with the unitary executive or any other provision of the Constitution. See *City of Alexandria v. United States*, 737 F.2d 1022, 1026 (Fed. Cir. 1984); Fisher, *Interpretation Outside the Courts*, *supra* note 96, at 86.

635. See Yoo et al., *supra* note 23, at 52, 98–99, 101–0259–60.

performed by officers in the executive branch.”<sup>636</sup> Thus, Reagan concluded, the “significant role” the bill assigned to the Comptroller General raised “serious constitutional questions,” because the Comptroller General was an agent of Congress who could not properly wield such executive power.<sup>637</sup> Although Reagan signed the legislation, he emphasized that he was “in no sense dismissing the constitutional problems or acquiescing in a violation of the system of separated powers carefully crafted by the framers of the Constitution.”<sup>638</sup> Therefore, notwithstanding his approval of the Act, the Reagan Administration successfully challenged Gramm-Rudman in court, arguing among other things that it unconstitutionally encroached upon the president’s Article II power to execute the laws.<sup>639</sup>

For the same reasons, the Reagan Administration also challenged the parts of the Competition in Contracting Act (CICA) that let the Comptroller General resolve protests entered by unsuccessful bidders for government contracts.<sup>640</sup> Reagan “vigorously object[ed] to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch.”<sup>641</sup> Thus, Attorney General Smith and OMB Director David Stockman issued orders to the executive agencies not to comply with CICA, and the Administration subsequently refused to comply with court orders upholding CICA’s constitutionality.<sup>642</sup> Although the courts did not ultimately accept Reagan’s objections to CICA,<sup>643</sup> the fact remains

636. Statement on Signing the Bill Increasing the Public Debt Limit and Enacting the Balanced Budget and Emergency Deficit Control Act of 1985 (Dec. 12, 1985), in 1985 PUB. PAPERS 1471, 1471.

637. *Id.* Reagan also harbored constitutional concerns about a provision in the Act requiring Comptroller General approval of all presidential terminations and modifications of defense contracts. Reagan noted, “Under our constitutional system, an agent of Congress may not exercise such supervisory authority over the President.” *Id.*

638. *Id.* at 1472. See generally FISHER & DEVINS, *supra* note 475, at 143–45, 148–50.

639. Brief for the United States at 13–17, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379). These arguments, of course, ultimately prevailed. *Bowsher*, 478 U.S. at 726–27.

640. CICA was enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, tit. VII, 98 Stat. 494 (codified as amended at 16 U.S.C. §§ 1274–1276 (2000)).

641. Statement on Signing the Deficit Reduction Act of 1984 (July 18, 1984), in 1984 PUB. PAPERS 1053, 1053; see also Kmiec, *supra* note 546, at 349 (noting the Justice Department’s objections to CICA).

642. See Rosenberg, *supra* note 291, at 691; May, *supra* note 302, at 979, 984 (citing H.R. REP. NO. 99-138, at 308 (1985)); see also FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 380, at 130 (discussing Congress’s assertion of “usurpation of the legislative function” in response to an executive plan to enforce the Civil Rights Act of 1964).

643. See *Parola v. Weinberger*, 848 F.2d 956, 959–60 (9th Cir. 1988); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1109–12 (9th Cir. 1988); *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d 875, 881–87 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988); *Universal Shipping Co.*

that the Reagan Administration protested Congress's efforts to assign the Comptroller General a role in executing the law as being inconsistent with the unitary executive.

The Reagan Administration also asserted the president's authority to control the execution of the laws directly. For instance, Reagan also took firm control of the federal government's legal affairs, expanding the Federal Legal Council, using opinions issued by the Office of Legal Counsel to centralize control of governmental litigation in the Attorney General,<sup>644</sup> and even assuming a role in determining the positions that his Administration would take before the Supreme Court.<sup>645</sup> The Reagan Administration also repudiated several informal nonstatutory understandings regarding the division of responsibility between the executive departments and the independent agencies<sup>646</sup> and challenged one such agency's efforts to file an amicus brief in federal appellate court.<sup>647</sup> In fact, the Reagan Administration went so far as to question the very constitutionality of these agencies supposed "independence." As Attorney General Meese noted: "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government."<sup>648</sup>

The Reagan Administration also asserted the President's authority to control the execution of the laws directly by continuing and expanding upon the regulatory review program initiated by his predecessors.<sup>649</sup> Executive Order 12,291 directed all executive agencies to employ cost-benefit analysis in implementing their regulations. The order further

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v. United States, 652 F. Supp. 668, 674-75 (D.D.C. 1987), *vacated as moot*, No. 87-5120 (D.C. Cir. Jan. 9, 1989).

644. Devins, *supra* note 159, at 266 (citing 6 Op. Off. Legal Counsel 47, 61-62 (1982); 6 Op. Off. Legal Counsel 180, 187-88 (1982)).

645. *Id.* at 285 (mentioning Reagan's reversal of a Solicitor General opinion and insistence that the Solicitor General file specified amicus briefs); Harvey, *supra* note 159, at 1585 (discussing the Attorney General's reversal of several opinions to fit Reagan's policies).

646. See Devins, *supra* note 159, at 268 (discussing the conflict between independent agencies and the Solicitor General).

647. Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 286-98 (1993) (describing the Reagan Administration's efforts to prevent the Equal Employment Opportunity Commission from filing an amicus brief in *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984)).

648. Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779, 789-90 (quoting Stuart Taylor, *A Question of Power, a Powerful Questioner*, N.Y. TIMES, Nov. 6, 1985, at B6); see also *id.* at 779 n.4 (noting that Meese suggested "that the entire system of independent agencies may be unconstitutional"); Miller, *supra* note 374, at 411 & n.66 (noting that Meese questioned the constitutionality of independent agencies).

649. For a complete description of the Reagan regulatory review program, see Percival, *supra* note 387, at 147-54; see also Bruff, *supra* note 473, at 549-51; Cross, *supra* note 471, at 496-98; DeWitt, *supra* note 387, at 773-76.

required them to submit all rules to OMB for prepublication review and to prepare Regulatory Impact Analyses (RIAs) of all major rules explicitly laying out the anticipated costs and benefits of the rule, the alternatives considered, and an explanation, if appropriate, of the reasons why the most cost-effective means of achieving the anticipated benefits was not adopted. OMB would review the proposed rules and the RIAs to maximize the "aggregate net benefits to society."<sup>650</sup>

Reagan supplemented Executive Order 12,291 with Executive Order 12,498, which empowered OMB to take formal control of the regulatory planning process by requiring agencies to submit to OMB a "draft regulatory program" describing "all significant regulatory actions" to be undertaken that year.<sup>651</sup> OMB would then resolve any inconsistencies between the draft regulatory program and the Administration's policies and would consolidate them into the Administration's overall regulatory plan. These two orders extended the White House's control over the agencies to a greater degree than ever before, by dictating substantive criteria that agencies had to employ in issuing regulations and by permitting OMB to postpone indefinitely the publication of regulations of which it disapproved.<sup>652</sup>

Reagan did not invoke any particular statutory authority for issuing these orders, instead relying solely on "the authority vested in [him] as President by the Constitution and laws of the United States of America"<sup>653</sup> as had so many of his predecessors.<sup>654</sup> Reagan specifically disclaimed any intent to direct agency decisionmaking, noting that nothing in the order "shall be

650. Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

651. Exec. Order No. 12,498, 3 C.F.R. 323 (1985).

652. See Percival, *supra* note 387, at 149–50. The Reagan Administration, like the Carter Administration, considered including the independent regulatory commissions within its program of regulatory review, but declined to do so. Memorandum from U.S. Dept. of Justice, Office of Legal Counsel, to the Hon. David Stockman, Director, Office of Management and Budget, Re: Proposed Executive Order on Federal Regulation 7–13 (Feb. 3, 1981), *reprinted in Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy & Commerce*, 97th Cong. 152, 158–64 (1981) [hereinafter OMB Hearings]; and PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 486–88 (1996). Interestingly, this portion of the memorandum was omitted from a later version of the same memo. See 5 Op. Off. Legal Counsel 59 (1981), *reprinted in OMB Hearings, supra*, at 486–98.

653. Exec. Order No. 12,291, pmb., 3 C.F.R. at 127; Exec. Order No. 12,498, pmb., 3 C.F.R. at 323. Courts reviewing these orders apparently agreed. See *Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1222–23 (D.C. Cir. 1983) (affirming application of cost/benefit requirement of Executive Order 12,291); *Env't. Def. Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986) ("A certain degree of deference must be given to the authority of the President to control and supervise executive policy making."); see also *Nat'l Fed'n of Fed. Employees, Local 1622 v. Brown*, 645 F.2d 1017, 1022 (D.C. Cir. 1981) ("Within the range of choice allowed by statute, the President may direct his subordinates' choices.").

654. See *supra* notes 122, 273, 339 and accompanying text; Yoo et al., *supra* note 23, at 81.

construed as displacing the agencies' responsibilities delegated by law."<sup>655</sup> Even opponents of the unitary executive theory recognized that the regulatory review program did in fact have a direct impact on regulatory outcomes and represented one of the most sweeping invocations of the unitary executive yet seen, in spite of strong congressional disapproval.<sup>656</sup> David Lewis notes:

[I]n response to President Reagan's subjection of all new regulations to cost-benefit analysis beginning in 1981, Congress attempted in 1986 to defund the agency responsible, the Office of Information and Regulatory Affairs (OIRA). After extracting what members believed to be concessions from the OMB and the White House, Congress relented in its attempts. Ambiguities in the agreement, however, led to continued conflict between the legislative and executive branches over the regulatory review practices of the OMB.<sup>657</sup>

During his second term, Reagan designated Meese to lead the Justice Department by appointing him Attorney General. Meese became very firmly committed to the theory of the unitary executive as well as to the authority and duty of all three branches to interpret the Constitution. As mentioned above, Meese explicitly questioned the constitutionality of independent agencies in a major speech,<sup>658</sup> which was widely noticed at the time.<sup>659</sup> He also made a speech defending departmentalism—the notion that all three branches of the federal government are co-equal interpreters of the Constitution—that was worthy of Thomas Jefferson or Abraham Lincoln.<sup>660</sup> Meese's so-called Tulane speech defending departmentalism is every bit as ringing as Abraham Lincoln's similar speech responding to *Dred Scott*.<sup>661</sup>

Reagan was decisive and personally in charge when it came to most matters of policy. When the question arose whether to invade and liberate the tiny Caribbean nation of Grenada, Reagan tersely ordered his joint chief

655. Exec. Order No. 12,291, § 3(f)(3), 3 C.F.R. 127, 130 (1981); see also Memorandum from U.S. Department of Justice, Office of Legal Counsel (Feb. 13, 1981), reprinted in *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong. 486 (1981) (indicating that OMB's then-proposed oversight role was advisory and consultative and did not authorize it to reject an agency's judgment as to matters delegated to it).

656. See Percival, *supra* note 389, at 990–93 (detailing Reagan's changes to regulatory review); Rosenberg, *supra* note 590, at 1200–01 (discussing the President's role in rulemaking).

657. LEWIS, *supra* note 34, at 85–86.

658. Edwin Meese III, Address Before the Federal Bar Association Annual Banquet (Sept. 13, 1985), in 32 FED. B. NEWS & J. 406, 406–08 (1985).

659. Howard Kurtz, *Agencies' Authority Challenged: Justice Department Seems to Side with Conservatives on Regulatory Power*, WASH. POST, Jan. 3, 1986, at A17; Stuart Taylor, Jr., *A Question of Power, A Powerful Questioner*, N.Y. TIMES, Nov. 6, 1985, at B8.

660. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

661. Calabresi & Yoo, *supra* note 20, at 719–20.

of staff, "Do it."<sup>662</sup> In the key arms control negotiation with Mikhail Gorbachev at Reykjavík, Iceland, Reagan took personal charge of the negotiations, and when Gorbachev tried to force him to abandon the Strategic Defense Initiative, Reagan dramatically walked out of the Reykjavík talks.<sup>663</sup> Jimmy Carter's National Security Advisor, Zbigniew Brzezinski, was later to mention Reagan's walkout at Reykjavík as the key moment when the Cold War was won.<sup>664</sup> Even after the disastrous Iran-Contra scandal broke, Reagan took the decisive action of appointing a three-member board of inquiry headed up by former Senator John Tower to investigate the scandal and get to the bottom of what happened. Reagan was, in short, a very decisive leader who always knew in what direction he wanted policy to go.

The historical record thus shows Ronald Reagan to be a steadfast proponent and supporter of the unitary executive. Thus, even if one agrees with Attorney General Smith that the Reagan Administration could have done more to protect presidential power, Reagan's efforts on behalf of the unitary executive certainly do not show any acquiescence in congressional dismemberment of the unitary executive. While Reagan should not have signed the reauthorization of the special prosecutor law, he did fight that law and many others like it in the courts. Ronald Reagan was, like his hero FDR, a committed proponent of the unitary executive.

#### IX. GEORGE H.W. BUSH

More than almost any other president, except for William Howard Taft, George Herbert Walker Bush staunchly defended the unitariness of the executive branch.<sup>665</sup> Bush was a vigorous, hands-on leader, and his attention to detail was appreciated by the public after concerns in Ronald Reagan's later years over his inattention to detail. As Bush's biographer, John Robert Greene reports:

Despite Americans' latent affection for Ronald Reagan, long before 1988 they had become troubled with his hands-off, detached approach to presidential leadership. In George Bush they found Reagan's polar opposite. Bush's style of executive leadership was characterized by indefatigable energy. Indeed, the words "energetic" and "hyperactive" damn Bush with faint praise; by any definition, he was a workaholic . . . . Bush's staff continually complained (or boasted, depending on whom they were talking to)

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662. MORRIS, *supra* note 598, at 501.

663. *Id.* at 599.

664. *Id.* at 658.

665. See Neal Devins, *Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service*, 41 UCLA L. REV. 1035, 1043 (1994) ("Bush, more than any other president, embraced the 'unitary executive' theory of White House control over government operations.") (footnote omitted).

about the long hours and the phone calls in the middle of the night from a boss who just wanted to talk.<sup>666</sup>

George Bush was clearly in charge of his Administration and was very attentive to detail. Thanks in large measure to his White House Counsel, C. Boyden Gray, and his superb legal staff, Bush defended the unitariness of the executive branch with almost academic rigor.

The Bush Administration began with the somewhat surprising decision that after eight years of Ronald Reagan, it was time to clean house. Greene reports that "[f]ar from the 'friendly takeover' that many members of the press, and, later, one influential scholarly book viewed it to be, Bush sounded as if he were taking the office away from a president of the other party."<sup>667</sup> Greene notes that superficially the cabinet seemed to belie this since seven Reagan cabinet members continued in the Bush Administration, but since "Bush had absolutely no intentions of dispersing power back to the departments,"<sup>668</sup> what really mattered was his complete overhaul of the White House staff. Greene notes that "[a]s the administration carried on, cabinet meetings became more infrequent. Though he made it clear to his staff that any member of his cabinet could see him at any time, Bush reserved the policy-making role for his White House staff."<sup>669</sup>

Early on in his Administration, Bush engaged in a major battle with the Democrats who controlled the Senate over the nomination of former Senator John Tower to be the new Secretary of Defense. Tower had been very supportive of Bush's career in Texas politics, and Bush stuck with him loyally and doggedly to the very end. When Tower's nomination was finally rejected on a 53-47 vote, it became the first cabinet nomination to fail since the last years of the Eisenhower Administration in 1959.<sup>670</sup> Bush immediately recovered by appointing Dick Cheney to be Secretary of Defense in place of Tower, and Cheney was easily confirmed. Bush's willingness to support Tower against all the odds sent an important signal to subordinates in the executive branch that loyalty would be a two-way street in the first Bush Administration.

Almost immediately after his inauguration, Bush expressed his concerns about "the erosion of presidential power."<sup>671</sup> In response to these concerns, Bush embarked upon one of the most aggressive defenses of the president's prerogatives the republic had ever seen. Bush used a plethora of vetoes and signing statements to protect against any invasions of the constitutional

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666. JOHN ROBERT GREENE, *THE PRESIDENCY OF GEORGE BUSH* 141 (2000).

667. *Id.* at 48.

668. *Id.* at 49.

669. *Id.* at 50.

670. *Id.* at 57.

671. See Lund, *supra* note 595, at 36.

authority of the presidency that he perceived.<sup>672</sup> Confronting from day one a Democratic majority in both the House and the Senate, Bush realized from the start that he was going to have to wield his veto power to great effect if he wanted to play a role in policy-making, and in the end Bush was to achieve astonishing success in using the veto. "[I]n four years Bush vetoed forty-four bills, and his veto was upheld forty-three times."<sup>673</sup> "The only [Bush veto ever to be] . . . overridden was on the Cable Television Protection and Competition Act of 1992."<sup>674</sup> Greene reports:

As a result of his successes with the veto, Bush was able to use the threat of it to affect how legislation was constructed. As of 25 July 1991, the White House Press Office had recorded thirty-eight threats of a presidential veto of legislation; the vast majority of the legislation on the list did not ever become law.<sup>675</sup>

In this way, Bush was able "to put a conservative cast on legislation that was, in its original form at least, marked by the liberal slant of the Democratic Congress."<sup>676</sup>

Perhaps the most important example for our purposes is the Ethics in Government Act, which was scheduled to expire in 1992. In a speech, Bush indicated that he would veto any extension of the independent-counsel statute unless significant changes were made.<sup>677</sup> At a luncheon with reporters, Attorney General William Barr reiterated the Bush Administration's dissatisfaction with the Act and confirmed the likelihood of a veto of the proposal then pending before Congress.<sup>678</sup> This veto threat, when combined with a filibuster organized by Senate Republicans, doomed the reauthorization legislation and "caused the Act to lapse."<sup>679</sup>

Bush undertook other steps to assert control over his Administration. For example, Bush charged that permitting executive agencies to present to Congress views differing from those of the Administration "infringe[d] upon [his] constitutional responsibility to supervise my subordinates and to

672. *Id.* at 41–42, 44. Professor Lund has suggested that Bush's signing statements were so scrupulous about the separation of powers that at times they became "almost comical." *Id.* at 44.

673. GREENE, *supra* note 666, at 62.

674. *Id.* (discussing veto of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460).

675. *Id.* at 62.

676. *Id.*

677. Remarks to the Federalist Society of Philadelphia in Philadelphia, Pennsylvania (Apr. 3, 1992), in 1992–93 PUB. PAPERS 532, 535.

678. See Sharon LaFraniere, *Barr Urges Fundamental Changes in Independent Counsel Statute*, WASH. POST, Apr. 8, 1992, at A5.

679. See Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 390 (1993).



ensure that the executive branch speaks with one voice.”<sup>680</sup> Therefore, Bush indicated that he would “interpret these provisions in a manner consistent with [his] constitutional authority, as head of a unitary executive branch, to resolve disputes among [his] subordinates before their views are presented to the Congress.”<sup>681</sup>

Bush also protested that statutes purporting to prohibit the president from changing any decisions made by executive officials “must be interpreted in light of my constitutional responsibility, as head of the unitary executive branch, to supervise [his] subordinates.”<sup>682</sup> Bush raised similar objections to statutes that attempted to guide the manner in which he controlled the executive branch.<sup>683</sup> As Bush noted, “[w]hen a member of the executive branch acts in an official capacity, the Constitution requires that I have the ultimate authority to supervise that officer in the exercise of his or her duties.”<sup>684</sup> Clearly, if any president aspired to a “zero-tolerance” policy with regards to infringements on the unitary executive, it was Bush.

680. Statement on Signing the Federal Deposit Insurance Corporation Improvement Act of 1991 (Dec. 19, 1991), in 1991 PUB. PAPERS 1649, 1650.

681. *Id.*; see also Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992 (Oct. 26, 1992), in 1992-93 PUB. PAPERS 2004, 2005 (objecting that a provision requiring an agency to report simultaneously to both the President and Congress “would intrude upon the President’s authority to supervise subordinate officials in the executive branch”); Statement on Signing the Housing and Community Development Act of 1992 (Oct. 28, 1992), in 1992-93 PUB. PAPERS 2060, 2061 (noting that the section authorizing an executive official to submit “reports, recommendations, testimony, or comments” to the Congress without prior approval or review by “any officer or agency of the United States” raised “constitutional difficulties”).

682. Statement on Signing the Energy and Water Development Appropriations Act, 1991 (Nov. 5, 1990), in 1990 PUB. PAPERS 1561, 1562; see also Statement on Signing the Bill Modifying the Boundaries of the Alaska Maritime National Wildlife Refuge (Nov. 21, 1990), in 1990 PUB. PAPERS 1664, 1664 (noting that the use of “independent” appraisers, who would not be subject to supervision by the President” was “contrary to Article II of the Constitution”); Statement on Signing the Omnibus Budget Reconciliation Act of 1989 (Dec. 19, 1989), in 1989 PUB. PAPERS 1718, 1719 (objecting that insulating subordinate officials of the Department of Health and Human Services from presidential review deprives the President “of his constitutional authority to supervise their actions”).

683. When faced with a provision purporting to determine how the President would resolve a dispute between the Secretary of Energy and the Administrator of AID, Bush concluded that the provision must be interpreted “consistent with [his] inherent constitutional authority as head of the executive branch to supervise [his] subordinates in the exercise of their duties, including [his] authority to settle disputes that occur between those officials through means other than those specified in the statute.” Statement on Signing the Energy Policy Act of 1992 (Oct. 24, 1992), in 1992 PUB. PAPERS 1962, 1963; see also Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1993 (Oct. 6, 1992), in 1992 PUB. PAPERS 1766, 1767 (objecting that provisions concerning regulatory review by OMB “could be interpreted to interfere with [his] authority under the Constitution to supervise the decision-making process within and management of the executive branch”).

684. Statement on Signing the Housing and Community Development Act of 1992, *supra* note 681, at 2061.

The Bush Administration also backed up these words with action. It ignored the failure of the Reagan Administration's challenges to the Comptroller General's role in executing the Competition in Contracting Act<sup>685</sup> and disregarded the fee-recovery provision of the Act for similar reasons.<sup>686</sup> Furthermore, the Bush Administration pressured Congress into enacting a version of the Whistleblower Protection Act that omitted the constitutionally objectionable features that led Reagan to pocket veto the initial version.<sup>687</sup> Specifically, the revised Whistleblower Protection Act dropped the previous attempt to give the Office of Special Counsel independent litigating authority. As Bush noted in his signing statement, this change

addresse[d] the chief constitutional concerns raised by earlier versions of this legislation. The most substantial improvement in the bill is the deletion of provisions that would have enabled the Special Counsel, an executive branch official, to oppose other executive branch agencies in court. Under our constitutional system, the executive branch cannot sue itself.<sup>688</sup>

The amendment also resolved another problem with the original legislation by providing that any materials submitted by the Office of Special Counsel to Congress would be submitted "concurrently" to the President, dropping the clause providing that such materials would be submitted without the President's review.<sup>689</sup> Bush's signing statement construed these provisions in a manner consistent with the unitary executive by stating, "I do not interpret these provisions to interfere with my ability to provide for appropriate prior review of transmittals by the Special Counsel to the Congress."<sup>690</sup>

Bush also asserted his control over the executive branch by continuing the regulatory review program established by Executive Orders 12,291 and 12,498 during the Reagan Administration. Bush supplemented these Executive Orders by creating an interagency task force known as the Council on Competitiveness, which was charged with coordinating regulatory policy and mediating disputes arising between OIRA and the agencies during the

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685. See *supra* notes 640-42 and accompanying text (noting Reagan's various challenges statutes attempting to vest executive authority in the Comptroller General).

686. A federal court did not reach the merits of the issue, dismissing the case on ripeness grounds. *United States v. Instruments, S.A., Inc.*, 807 F. Supp. 811, 815 (D.D.C. 1992); see also May, *supra* note 302, at 979 n.549 (discussing the boundaries of presidential authority).

687. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16; see Kmiec, *supra* note 546, at 343-44 (quoting Harmon, who asserted that Congress did not have the right to put limitations on the president's executive authority).

688. Statement on the Signing of the Whistleblower Protection Act of 1989 (Apr. 10, 1989), in 1989 PUB. PAPERS 391, 392.

689. § 3(a)(13), 103 Stat. at 28.

690. Statement on the Signing of the Whistleblower Protection Act of 1989, *supra* note 688, at 392.

regulatory review process.<sup>691</sup> Through this mechanism, the Bush White House was able to exert its control over the entire executive branch in an extremely effective manner. David Lewis reports that the Council on Competitiveness so irked Congress that in "1992, the House voted to delete funding for the salaries of staffers on the council, but the Senate restored the funds when President Bush threatened a veto."<sup>692</sup>

The Council on Competitiveness's effectiveness is especially evident, for example, in one incident when Bush partially overruled both OMB and the Food and Drug Administration (FDA). In this instance, Bush approved a modification to food labeling requirements proposed by the FDA over OMB's objections, but changed the substantive scope of the FDA's proposed rule by exempting restaurants in partial accommodation of OMB's concerns.<sup>693</sup> It would be a mistake to construe Bush's willingness to compromise as suggesting that the decision was anyone's but the president's to make. As FDA Commissioner David Kessler acknowledged, "If the decision went against me, I could not disobey an order from the President. For me as a political appointee, the only response to defeat was to leave."<sup>694</sup> Indeed, when Deputy Chief of Staff Bob Zoellick informed Kessler of the final outcome, he flatly stated, "This is the President's decision."<sup>695</sup>

It is true that Bush found himself unable to mandate the solution initially preferred by OMB. Bush noted with some surprise, "I can't just make a decision and have it promptly executed, that the Department can't just salute smartly and go execute whatever decision I make."<sup>696</sup> Some critics of the unitary executive have mistakenly taken this statement as a reflection of limitations on the president's sole authority to execute the law.<sup>697</sup> Closer inspection reveals any such conclusions to be erroneous. Bush's inability to impose OMB's proposal did not reflect any substantive restrictions on the president's authority to execute the law, but rather stemmed from the fact that changes of the magnitude proposed by OMB would have to be subjected to the notice-and-comment requirements of the Administrative

691. See Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 165-73 (1995) (giving an example of presidential rule-making); see also Herz, *supra* note 387, at 223-26 (giving another example of presidential rulemaking); Percival, *supra* note 387, at 154-55 (same); DeWitt, *supra* note 387, at 776-78 (same). Bush also issued executive orders requiring agencies to consider the effect proposed regulations would have on families and on federalism. See Exec. Order No. 12,606, 3 C.F.R. 241 (1993); Exec. Order No. 12,612, 3 C.F.R. 252 (1987). See generally Moreno, *supra* note 105, at 492-93 (discussing the legislative veto).

692. LEWIS, *supra* note 34, at 86.

693. DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 71 (2001).

694. *Id.* at 67.

695. *Id.* at 70.

696. *Id.* at 68.

697. See Percival, *supra* note 389, at 994-95.

Procedure Act, which would delay the decision by at least six to eight weeks and leave the final decision to the Clinton Administration.<sup>698</sup>

Bush also attempted to assert his control over the independent agencies when he directed the U.S. Postal Service to withdraw its suit against the Postal Rate Commission "pursuant to the President's authority as Chief Executive and his obligation to take care that the laws are faithfully executed."<sup>699</sup> Bush backed up his order by threatening to remove members of the Postal Service's Board of Governors who refused to go along with his order.<sup>700</sup> That the courts eventually refused to back up Bush's order<sup>701</sup> does not blunt the fact that the Bush Administration's position did represent a strong assertion of the unitariness of the executive branch.

There was one major removal in the Bush years, and it involved Governor John Sununu, Bush's first White House Chief of Staff. Although brilliant and dedicated, Sununu ultimately became a big liability to Bush. George W. Bush and Andrew Card, Sununu's deputy, ultimately persuaded Sununu that Bush wanted him to resign, and he finally did so on December 3, 1991. There is no question that the resignation was a forced one, for the angry Sununu did not want to leave.

In addition, Bush continued the pattern of presidential opposition to the legislative veto as an impermissible violation of the separation of powers.<sup>702</sup> Accordingly, Bush announced that he would "treat [legislative vetoes] as having no legal force or effect in this or any other legislation in

698. KESSLER, *supra* note 694, at 68.

699. Memorandum of President George Bush to Postmaster General Marvin Runyon (Dec. 11, 1992), *quoted in* Devins, *supra* note 665, at 1045.

700. See Devins, *supra* note 665, at 1043-46; Lund, *supra* note 595, at 79-82.

701. The D.C. Circuit ruled against the Bush Administration's arguments on all counts, enjoining the removal of the members of the Board of Governors and holding that the Postal Service had the authority to bring suit against the Postal Rate Commission despite the President's contrary wishes. *Mail Order Ass'n v. USPS*, 986 F.2d 509, 527 & n.9 (D.C. Cir. 1993).

702. Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1993 (Oct. 5, 1992), *in* 1992 PUB. PAPERS 1756, 1757; Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1993, *supra* note 683, at 1767; Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1992 (Oct. 28, 1991), *in* 1991 PUB. PAPERS 1349, 1350; Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1991 (Nov. 5, 1990), *in* 1990 PUB. PAPERS 1558, 1559; Statement on Signing the International Narcotics Act of 1989 (Dec. 13, 1989), *in* 1989 PUB. PAPERS 1698, 1699; Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990 (Nov. 30, 1989), *in* 1989 PUB. PAPERS 1609, 1611; Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990 (Nov. 3, 1989), *in* 1989 PUB. PAPERS 1448, 1449; Statement on Signing the Omnibus Budget Reconciliation Act of 1990 (Nov. 5, 1990), *in* 1990 PUB. PAPERS 1553, 1555; *see also* 16 Op. Off. Legal Counsel, 18 (1992) (preliminary print); 14 Op. Off. Legal Counsel 37, 38 (1990) (preliminary print). Despite Bush's attempt to object to every legislative veto, Reagan and Bush reportedly signed more than two hundred new legislative vetoes into law after *Chadha* and often complied with them. *See* Fisher, *Legislative Vetoes*, *supra* note 96, at 288; Lund, *supra* note 595, at 65.

which they appear."<sup>703</sup> Although the Bush Administration did enter into at least one informal agreement with Congress that would have had much the same effect as a legislative veto,<sup>704</sup> such informal arrangements did not raise the same constitutional concerns as true legislative vetoes.<sup>705</sup>

But even an administration as vigilant about protecting presidential power as Bush's occasionally failed in its duty to protect the unitariness of the executive branch. When Congress enacted a statute permitting members of Congress to exercise control over the management of Washington National and Dulles Airports, the Bush Administration failed to challenge its constitutionality before the Supreme Court when given the opportunity to do so.<sup>706</sup> The Bush Administration did not suffer for its mistake, as the Supreme Court nonetheless struck down the legislation in part because it represented an impermissible exercise of executive power by members of the legislative branch.<sup>707</sup>

The Bush Administration's failure to defend the unitary executive in this one regard simply underscores the propriety of requiring that a presidential practice be systematic, unbroken, and long standing before it can form the basis for inferring acquiescence for the purposes of coordinate construction. It should not undermine the other, ample evidence that President Bush determinedly defended the President's authority to execute the laws throughout his Administration and that he almost invariably acted to protect the unitariness of the executive branch against any and all congressional attempts to encroach upon it.

The Bush Administration ended with some extraordinary Christmas pardons of leading figures being investigated in the Iran-Contra probe headed up by independent counsel Lawrence Walsh. Among those pardoned were Caspar Weinberger, former Secretary of Defense to President Reagan. The Walsh investigation was seen by the first President Bush and by most Republicans as being a partisan, vindictive witch hunt. Indeed, it is fair to say that Republicans saw the Walsh investigation as an

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703. Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990, *supra* note 702, at 1449; *see also* Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1991, *supra* note 702, at 1559; Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1992, *supra* note 702, at 1350; Statement on Signing the Department of the Interior and Related Agencies Act, 1993, *supra* note 702, at 1757; Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1993, *supra* note 683, at 1767.

704. In 1989, Secretary of State James A. Baker III agreed to give four congressional committees the right to approve the release of \$50 million in humanitarian aid to the Nicaraguan Contras. FISHER & DEVINS, *supra* note 475, at 130, 141-42; Fisher, *Legislative Veto*, *supra* note 96, at 291; Lund, *supra* note 595, at 64-65.

705. *See* Fisher, *Interpretation Outside the Courts*, *supra* note 96, at 86; Lund, *supra* note 595, at 65.

706. *See* Lund, *supra* note 595, at 70-79.

707. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275-76 (1991).

abusive prosecution in the same way Democrats later viewed Kenneth Starr's investigations of President Bill Clinton.

President Bush's pardons of Weinberger and others for all practical purposes ended the Walsh investigation dead in its tracks. These pardons showed the first President Bush's determination not to let a court-appointed independent counsel interfere with the presidential power to see to it that the laws were faithfully executed. The Christmas pardons were thus a triumph for the unitary executive. They allowed the President to reassert executive power over the Walsh investigation that the Ethics in Government Act had wrongly taken away from him.

#### X. WILLIAM J. CLINTON

Although Bill Clinton has emerged as one of the most controversial presidents of the twentieth century,<sup>708</sup> all agree that Clinton's intelligence and knowledge of policy-making details was very impressive. Joe Klein, Clinton's biographer, notes that the president's staff was awed by:

Clinton's intelligence—particularly, his encyclopedic knowledge of policy questions—his perseverance and his ability to charm almost anyone under any circumstances; he was, without question, the most talented politician of his generation. At close range, his skills could be breathtaking: He was always the center of attention; he filled any room he entered.<sup>709</sup>

Klein adds that Clinton "seemed to know everything there was to know about domestic social policy."<sup>710</sup> Others echo these conclusions with regard to Clinton's knowledge of policy-making details. Klein quotes one observer as saying that Clinton was "[j]ust remarkable. . . . You call him up and ask, 'Who's doing interesting things in housing?' And he can tell you what *everyone* is doing—every last housing experiment in every state."<sup>711</sup>

Harold Varmus, Clinton's Director of the National Institutes of Health, remembered Clinton grilling "AIDS researchers for several hours, asking questions so detailed and sophisticated that most of the participants were shocked by his mastery of the issue."<sup>712</sup> Clinton seemed to promise so much with "his intelligence and remarkable political skills, . . . his detailed knowledge of almost every government activity, . . . his very presence."<sup>713</sup> In

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708. See James Lindgren & Steven G. Calabresi, *Rating the Presidents of the United States, 1789–2000: A Survey of Scholars in Political Science, History, and Law*, 18 CONST. COMM. 583, 591–92 (2001) (rating Clinton as the most controversial president in history on the grounds that the ratings of Clinton in a survey of historians, legal scholars, and political scientists exhibited the greatest variability).

709. JOE KLEIN, *THE NATURAL* 3–4 (2002).

710. *Id.* at 26.

711. *Id.* (quoting David Osborne).

712. *Id.* at 188.

713. *Id.* at 216.

sum, there can be no doubt about the force of Clinton's intelligence or about his mastery of the details of policy-making.

In addition, Clinton was an unusually hard-working president who was deeply immersed in the policy-making details of his Administration. Clinton demanded total control over the workings of the executive branch—and this attitude filtered into his decisions in appointing and dismissing as well as controlling subordinates:

Clinton's problems stem not from his oft-reported love of detail, but also from his desire to reach down into his administration to make minor decisions best left to others. Consider the delays in filling important jobs in the administration. Clinton demanded that he be involved in "signing off on the appointment of every assistant secretary, and sometimes deputy assistant secretaries." The desire to be involved in every level of administration and in the many detailed debates of his policies reflects more than a quest for excellence; it suggests a need for control . . . . By setting up a freewheeling staff system without clear lines of authority, by allowing lines of authority to be blurred, and by attempting to act as his own chief of staff, Clinton not only retains a large measure of control but remains the focus and the center. By appointing a cabinet that reflects both strong left-of-center leanings (Donna Shalala, Henry Cisneros, Robert Reich) and strong moderate leanings (Lloyd Bentsen, Janet Reno), Clinton has done more than ensure he will get conflicting views; he has set himself as the center, as the person to be convinced, the person toward whom all debate is addressed.<sup>714</sup>

Both Bill and Hillary Clinton "have a greater need than is good for them to have people around them whose loyalty—and lack of independence—wasn't in question."<sup>715</sup> When it came to selecting his first chief of staff, "[f]riend after friend of Clinton said Clinton didn't want a Jim Baker (Reagan's strong, and cunning Chief of Staff). He wanted someone with whom he was utterly comfortable, whom he could completely trust, who had no agenda of his own, and who wouldn't get in his way" because "to his own great detriment, Clinton wanted to be his own Chief of Staff."<sup>716</sup>

In addition, Clinton did not hesitate to exercise his authority to remove executive officials. In October 1993, following a major battle in Somalia and a serious blunder in Haiti, National Security Advisor Anthony Lake and Secretary of State Warren Christopher both offered to resign, but Defense

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714. STANLEY A. RENSHON, *HIGH HOPES: THE CLINTON PRESIDENCY AND THE POLITICS OF AMBITION* 260 (1998) (citations omitted) (quoting ELIZABETH DREW, *ON THE EDGE: THE CLINTON PRESIDENCY* 99 (1994)).

715. *Id.* at 264.

716. *Id.* (quoting DREW, *supra* note 714, at 130, 235).

Secretary Les Aspin, who was "less prompt with his tender, was the one who was asked to leave."<sup>717</sup> The effective dismissal of Les Aspin was probably the most visible removal of the Clinton Administration.

In addition to determining the composition of his Administration, Clinton meticulously protected the executive from infringements of constitutional power throughout his term when signing legislation into law.<sup>718</sup> Moreover, he employed a wide array of institutional arrangements to ensure that he retained control over the execution of the law, which have been superbly documented in a recent article in the *Harvard Law Review* by Dean Elena Kagan, who previously worked on Clinton's White House staff.<sup>719</sup> For example, Clinton left the system of OMB regulatory oversight instituted during the Reagan and Bush Administrations largely intact. Specifically, Clinton continued to require agencies to participate in a regulatory-planning process and to submit major regulations for OMB review.<sup>720</sup> After the criticism leveled by Democrats at OMB involvement in the regulatory process,<sup>721</sup> that Clinton would continue this program might be regarded as something of a surprise. Clinton did institute some changes in the program to mitigate the more deregulatory bent of the Reagan-Bush program of regulatory review. Although Clinton's scheme continued to evaluate rules through the lens of cost-benefit analysis,<sup>722</sup> it broadened the inquiry to allow consideration of other factors, such as "equity," "distributive impacts," and "qualitative measures."<sup>723</sup>

In addition, the Clinton program regularized many of the procedures surrounding regulatory review, requiring disclosure of all ex parte contacts and written communications between OIRA and the agency,<sup>724</sup> and placing limits on the time available for OMB review.<sup>725</sup> The executive order implementing the scheme also listed as one of its goals the "reaffirm[ation of] the primacy of Federal agencies in the regulatory decision-making process" and averred that "the regulatory process shall be conducted . . .

717. *Id.* at 73.

718. See, e.g., Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Apr. 30, 1994), in 1994 PUB. PAPERS 807, 808 ("Article II of the Constitution confers the Executive power of the United States on the President alone."); Statement on Signing the Holocaust Victims Redress Act (Feb. 13, 1998), in 1998 PUB. PAPERS 225, 225 ("Article II of the Constitution confers on the President alone the Executive powers of the United States.").

719. See Kagan, *supra* note 24.

720. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2000).

721. See Devins, *supra* note 159, at 256; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 17, 27 (1995); Shane, *supra* note 691, at 174.

722. Exec. Order No. 12,866, §§ 1(b)(5)-(6), 6(a)(3)(B)(ii), 6(a)(3)(C), 3 C.F.R. at 639, 645.

723. *Id.* § 1(a), 3 C.F.R. at 639.

724. *Id.* § 6(b)(4), 3 C.F.R. at 647-48.

725. *Id.* § 6(b)(2), 3 C.F.R. at 646-47.



with due regard to the discretion that has been entrusted to the Federal agencies."<sup>726</sup>

What did not change was the commitment to the unitariness of the executive branch underlying the institution of OMB review. Clinton's executive order clearly put the president in the position of resolving any interagency disputes that emerged from OMB review.<sup>727</sup> "At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency . . . of the President's decision with respect to the matter."<sup>728</sup> Centralized regulatory planning and oversight continued to give the president a powerful tool for exercising control over his administration. Moreover, the decision to make the president the person to resolve any conflicts "constituted a striking assertion of executive authority."<sup>729</sup>

Indeed, although centralized regulatory review was criticized as a largely deregulatory-oriented institution during the Reagan and Bush Administrations, the experience under the Clinton Administration revealed that its importance transcended mere partisan politics. Instead, it is driven by the more fundamental and enduring issue of the proper balance of power within the federal government and the most effective way to ensure effective execution of the law.

In some ways, Clinton expanded the regulatory review process far beyond that employed by Reagan and Bush. For example, unlike Reagan, who asserted that he had the authority to include the independent agencies within OMB review but declined to do so as a matter of discretion,<sup>730</sup> Clinton required the independent agencies to participate in the regulatory planning process.<sup>731</sup> Policies proposed by the independent agencies that were in conflict with other agency action or "the President's priorities" would be required to participate in "further consideration."<sup>732</sup> Clinton's belief in the president's authority over the independent agencies was also evident in his response to legislation turning the Social Security Administration into an independent agency headed by an Administrator who was removable only for "neglect of duty or malfeasance in office."<sup>733</sup> When signing the bill into law, Clinton noted that the removal provisions raised significant constitutional questions.<sup>734</sup>

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726. *Id.* pmbi., 3 C.F.R. at 638

727. *Id.* § 7, 3 C.F.R. at 648.

728. *Id.*

729. Kagan, *supra* note 24, at 2289.

730. *See supra* note 652.

731. § 4(c), 3 C.F.R. at 642.

732. *Id.* § 4(c)(4)-(6), 3 C.F.R. at 643.

733. 42 U.S.C. § 902(a)(3) (2000).

734. President's Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), in 1994 PUB. PAPERS 1471, 1472.

Clinton also sent letters to the independent agencies requesting that they take action on particular issues, although it has been suggested that these communications more resembled requests than orders from the head of the administrative state.<sup>735</sup> As Kagan notes, the inclusion of the independent agencies within the regulatory planning process "signified a strong commitment to presidential oversight of administration" that exceeded even that asserted under Reagan.<sup>736</sup>

Clinton also demonstrated his support for the president's authority to implement the laws by issuing directives to other federal officials about how they should exercise their discretionary authority across a wide range of areas.<sup>737</sup> In short, "[t]he President . . . asserted his right as head of the executive branch to determine how its internal processes and constituent units were to function."<sup>738</sup> Although both Reagan and Bush had employed this device in the past, Clinton took it to a completely different level. Not only did Clinton issue many more such directives than did any of his predecessors,<sup>739</sup> but Clinton's interventions also went far beyond the managerial issues that had previously been the subject of such directives, such as the administration of the national park system, the armed forces, and federal contracting. Instead, Clinton's orders had a broad impact on nongovernmental actors and rights customarily viewed as private.<sup>740</sup> Such authority was extremely helpful with respect to issues that transcended the classic departmental boundaries or required significant coordination<sup>741</sup> and Presidential authority became all the more important after the Democrats lost control of Congress.<sup>742</sup> Clinton's domination of the lower agencies "sa[id] something significant about the nature of the relationship between the agencies and the President—to say that they were *his* and so too were their decisions."<sup>743</sup>

735. See Kagan, *supra* note 24, at 2308–09.

736. *Id.* at 2288; see also Pildes & Sunstein, *supra* note 721, at 29 (arguing that the inclusion of the independent agencies within the Clinton regulatory review scheme was driven in part by "an especially strong commitment to centralized presidential oversight of the large policy judgments made by independent agencies").

737. See Kagan, *supra* note 24, at 2282–84, 2292, 2303–06 (detailing instances of presidential direction of federal policy in a wide range of areas, including health care; firearms regulation; nondiscrimination with respect to sexual orientation, parental status, or genetics; labor policy; energy and environmental policy; child support; youth smoking; and family leave).

738. *Id.* at 2292.

739. Kagan identifies only nine instances in which Reagan directed heads of domestic policy agencies on a matter of substantive regulatory policy. Bush issued four such directives. Clinton, in contrast, issued 107 such orders. *Id.* at 2294–95.

740. *Id.* at 2291–92.

741. *Id.* at 2306.

742. Kagan, *supra* note 24, at 2312.

743. *Id.* at 2290.

Clinton's close association with regulatory policy was apparent not only in his willingness to assert control over the agencies, but also in the manner in which he communicated those policies to the American people. As Kagan notes:

In this administration, . . . nothing was too bureaucratic for the President. In event after event, speech after speech, Clinton claimed ownership of administrative actions, presenting them to the public as his own—as the product of his values and decisions. He emerged in public, and to the public, as the wielder of “executive authority” and, in that capacity, the source of regulatory action.<sup>744</sup>

The manner in which Clinton used the bully pulpit to control the direction of his Administration and to mobilize public support for his regulatory program “sent a loud and lingering message: these were *his* agencies; *he* was responsible for their actions; and *he* was due credit for their successes.”<sup>745</sup> Indeed, so great was Clinton's domination of his administration that one senator accused Clinton of “debasing the constitutional structure.”<sup>746</sup> Using language reminiscent of criticisms leveled at Andrew Jackson, Abraham Lincoln, and Andrew Johnson,<sup>747</sup> Congressman J.C. Watts criticized Clinton for “pretty much . . . acting as the king of the world.”<sup>748</sup>

Another major initiative launched by Clinton was the attempt to reinvent government to be smaller and more efficient. Vice President Albert Gore was charged with being the point man on the “Reinventing Government” reform portfolio.<sup>749</sup> Klein describes Gore's involvement in the project as follows:

The Reinventing Government project was perfect for [Gore], very worthy if eminently vice presidential: Presidents usually have more important things to worry about than how the government actually works. But Reinventing Government was a particular favorite of New Democrats, who loved the idea of a direct assault upon the ancient paradigm of federal bureaucracy. . . .<sup>750</sup>

744. *Id.* at 2300.

745. *Id.* at 2302.

746. John J. Fialka, *Clinton Is Likely to Leave the Presidency with Record of Having Protected Lands*, WALL ST. J., Dec. 29, 2000, at A18 (quoting Sen. Larry Craig), *quoted in* Kagan, *supra* note 24, at 2314.

747. See Calabresi & Yoo, *supra* note 17, at 1529, 1543; Calabresi & Yoo, *supra* note 20, at 733, 744.

748. *News Hour with Jim Lehrer* (PBS television broadcast transcript, Jan. 22, 2001), available at [http://www.pbs.org/newshour/bb/politics/jan-june01/abortion\\_1-22.html](http://www.pbs.org/newshour/bb/politics/jan-june01/abortion_1-22.html) (last visited Jan. 29, 2005), *quoted in* Kagan, *supra* note 24, at 2314.

749. KLEIN, *supra* note 709, at 65.

750. *Id.* at 66.

Many aspects of this program would prove quite successful:

The federal workforce would be reduced by about 350,000 and an estimated \$157 billion saved. Equally important, 16,000 pages of bureaucratic regulations would be tossed—including some of the more famous government snafus, like the purchasing regulations at the Pentagon that resulted in \$700 toilet seats and \$150 hammers.<sup>751</sup>

Ultimately, however, the plan to “reinvent government” was to some degree sidetracked by Clinton’s desire for new programs in health care and housing. That Clinton was unable to marshal the resources to carry through the attempt to reinvent government should not be taken as any belief that he lacked the power to do so.

It must be conceded that one low point of the Clinton Administration from the point of view of the unitary executive came with the creation of the Social Security Administration as an independent agency in 1995.<sup>752</sup> Given all the extraordinary steps Clinton took to augment presidential control over the executive branch, however, this must be seen as a relatively minor departure in an administration that was otherwise quite committed to executive unitariness.

The Clinton Administration ended in January of 2001 with quite a bang. President Clinton chose to depart office after “granting 177 presidential pardons and commutations of sentences on his last night in office.” As Klein reports:

There was a libidinous crudeness to all of this. It was a final self-indulgence, a total loss of control. Other presidents had granted last-minute pardons, had signed last-minute executive orders, had staged bathetic [sic] farewell tours—but the rapacious enormity of these conceits and absolutions seemed to recapitulate Clinton’s most loathsome qualities.<sup>753</sup>

The only bright spot about the pardons was that they showed the extent to which, for better or worse, the Constitution puts the President squarely in charge of the law enforcement process.

Although there is always room for disagreement as to the substance of Clinton’s policies, in retrospect his commitment to the unitariness of the executive branch cannot be gainsaid. As Clinton himself noted toward the end of his presidency, “I think if you go back over the whole reach of our tenure here, I have always tried to use the executive authority.”<sup>754</sup>

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751. *Id.* at 67.

752. LEWIS, *supra* note 34, at 41.

753. KLEIN, *supra* note 709, at 204.

754. President’s News Conference, 35 WEEKLY COMP. PRES. DOC. 2537, 2541 (Dec. 8, 1999).

## XI. THE CLINTON IMPEACHMENT AND THE DEATH OF THE ETHICS IN GOVERNMENT ACT

The Clinton years also witnessed one of the most climactic moments in the history of the unitary executive: the death of the Ethics in Government Act and the institution of court-appointed independent counsels. This demise began when Clinton directed Attorney General Janet Reno to investigate allegations of improper conduct regarding the Arkansas Whitewater Development Corporation. On January 20, 1994, Reno appointed Robert Fiske, a moderate Republican and prominent member of the New York Bar who had served as U.S. Attorney for the Southern District of New York during the Carter Administration, as special counsel to investigate Whitewater.

While the investigation was underway, Congress repassed the Ethics in Government Act, which had lapsed in 1992 at the end of the Bush Administration because of the first President Bush's constitutionally motivated veto threats.<sup>755</sup> A three-judge court designated under the statute to oversee the independent counsels immediately dismissed Fiske on the grounds that because he had been picked by the Administration to investigate Whitewater, he was insufficiently independent.<sup>756</sup> In a fateful move, the three-judge court instead tapped Kenneth Starr, a former federal circuit judge and Solicitor General during the Bush Administration, to be the Whitewater independent counsel. Starr's inquiry kept expanding as more and more new subjects opened up for him to investigate, including firings in the White House Travel Office and even the suicide of Deputy White House Counsel Vince Foster.

Eventually, the Starr investigation collided with a sexual harassment suit brought against Clinton by Paula Jones, who alleged that Clinton had exposed himself to her and had demanded oral sex after seeing her managing the registration desk at a conference when Clinton was governor of Arkansas. Jones sued Clinton, who claimed an executive privilege to the effect that a sitting president is not subject to civil suit for events that took place before he took office. This issue went up to the Supreme Court, and the Clinton Administration's Solicitor General's office argued that the Court should find a privilege such that Jones's suit would be postponed until after Clinton left office. The Administration's brief began with the claim that:

To require that the President defend against private civil lawsuits in state and federal courts during his term of office would intrude impermissibly upon the President's performance of his constitutional duties, in violation of separation of powers principles. In both constitutional and practical terms, the demands

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755. See Shane, *supra* note 679, at 390.

756. See Gormley, *supra* note 478, at 684.

placed upon the President under Article II are unceasing. A sitting President cannot defend himself against litigation seeking to impose personal financial liability without diverting his energy and attention from the exercise of the "executive Power" of the United States. A judicial order requiring the President to participate in the defense of a private civil suit would therefore place the court in the position of impairing a coordinate Branch of the government in the performance of its constitutional functions.<sup>757</sup>

The Supreme Court ruled unanimously against Clinton,<sup>758</sup> although Justice Stephen Breyer wrote what can best be described as a Clinton-friendly concurrence.<sup>759</sup> One great point of amusement about the Court's opinion in *Clinton v. Jones* was Justice Stevens's statement, hilarious in retrospect, that the case was "highly unlikely to occupy any substantial amount of [Clinton's] time."<sup>760</sup>

In the wake of the Supreme Court's decision in *Clinton v. Jones*, Jones's attorneys deposed the President, asking him about his not-so-secret affair with Monica Lewinsky, a White House intern. When confronted with the Lewinsky allegations, Clinton denied under oath having a sexual relationship with Lewinsky, which in turn led Starr to investigate charges of perjury and obstruction of justice by the President. These charges ultimately led to Clinton's impeachment by the House of Representatives on December 19, 1998, and his subsequent acquittal by the Senate on February 12, 1999.

Although some scholars predicted that the Clinton impeachment would weaken the presidency just as had the failed impeachment of Andrew Johnson,<sup>761</sup> other scholars wrote that this view overlooks a fundamental difference between the two impeachments.<sup>762</sup> Although there was certainly a partisan element to both impeachments, as Keith Whittington has eloquently demonstrated, "[t]he Johnson impeachment was centrally about

757. Brief for the United States as Amicus Curiae in Support of Petitioner at 4, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853).

758. *Clinton v. Jones*, 520 U.S. 681 (1997).

759. *Id.* at 710 (Breyer, J., concurring).

760. *Id.* at 702.

761. See R.W. Apple Jr., *The Fallout of the Trial*, N.Y. TIMES, Feb. 13, 1999, at A1 (quoting Arthur M. Schlesinger, Jr.).

762. The most extended statement of this position is Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422 (2000). See also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 6 (2002) ("[U]nlike the other instance—the impeachment of Bill Clinton—at the center of the Johnson impeachment was a fundamental power struggle between the two branches on the most critical issues of the day."); Laura Kalman, *The (Un?)Bearable Liteness of E-Mail: Historians, Impeachment and Bush v. Gore*, 4 THEORETICAL INQ. L. 579, 602 (2003) ("In fact, Clinton's impeachment bore few parallels to Johnson's.").

presidential power.<sup>763</sup> Whittington writes that the Johnson impeachment was particularly concerned with which branch would control Reconstruction<sup>764</sup> and with Johnson's conception of the president as the direct spokesperson for the people and the sole head of a unitary executive branch.<sup>765</sup> The Johnson impeachment was thus in no small part a battle between Congress and Johnson over the proper role of the presidency in the constitutional order. Indeed, it is no accident that the "high crime" that provided the basis for Johnson's impeachment—the removal of Secretary of War Edward Stanton in contravention of the Tenure of Office Act of 1867—was a crime that could only have been committed by the president and not by any other individual.<sup>766</sup> Nothing less than the very structure of the federal government hung in the balance during the Johnson impeachment.

In stark contrast, the Clinton impeachment focused on the particular individual holding the office of president and not the presidency itself. Indeed, as Whittington notes, "[t]he Clinton impeachment was so unsatisfying in part because it seemed so constitutionally unimportant."<sup>767</sup> Neither the president nor Congress used the impeachment process as a platform for advancing a vision of the president's place within the constitutional order.<sup>768</sup> As a result, Whittington argues that the Clinton impeachment is unlikely to have significant implications for the distribution of power between the legislative and executive branches.<sup>769</sup>

In the end, the most important consequence of these events for the theory of the unitary executive was that it led to the Clinton Administration's abandonment of its prior support for the Ethics in Government Act and the whole system of court-appointed independent counsels. This was the case in part because Clinton was by no means the only member of his Administration to be dogged by an independent-counsel investigation. Five members of Clinton's Cabinet were investigated by special prosecutors, as many as all the Carter, Reagan, and Bush officials investigated between 1978 and 1992.<sup>770</sup> Thus, when the Ethics in Government Act came up for renewal in 1999, the Clinton Administration dropped its previous support for the Act, and the Act ultimately lapsed.

The first indication of this change in position appeared in Deputy Attorney General Eric Holder's testimony during House subcommittee

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763. Whittington, *supra* note 762, at 426.

764. *Id.* at 427–31.

765. *Id.* at 438–39.

766. *Id.* at 443.

767. *Id.* at 459.

768. Whittington, *supra* note 762, at 455.

769. *Id.* at 450–59.

770. *Id.* at 88.

hearings on reauthorization.<sup>771</sup> Attorney General Reno offered similar testimony before the Senate Committee on Governmental Affairs about the Act:

After much reflection and inquiry, we [at the Justice Department] have decided—reluctantly—to oppose reauthorization of the Independent Counsel Act. . . . In 1993, as many of you know, I testified in support of the statute. . . . However, after working with the Act, I have come to believe—after much reflection and with great reluctance—that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework . . . .

Our Founders set up three branches of government: a Congress that would make the laws, an Executive that would enforce them, and a judiciary that would decide when they had been broken. The Attorney General, who is appointed by the President and confirmed by the Senate, is publicly accountable for her decisions . . . .

In contrast, the independent counsel is vested with the full gamut of prosecutorial powers, but with little of its accountability. He has not been confirmed by the Senate, and he is not typically subject to the same sorts of oversight or budgetary constraints that the Department faces day in and day out. Accountability is no small matter. It goes to the very heart of our constitutional scheme. Our Founders believed that the enormity of the prosecutorial power—and all the decisions about who, what, and whether to prosecute—should be vested in one who is responsible to the people. That way—and here I am paraphrasing Justice Scalia's dissent in *Morrison v. Olson*—whether we're talking about over-prosecuting or under-prosecuting, "the blame can be assigned to someone who can be punished." It was for this reason that the American republic survived for over 200 years without an Independent Counsel Act.<sup>772</sup>

Both the first (Archibald Cox) and the last (Kenneth Starr) of the modern independent counsels asked Congress to let the statute die.<sup>773</sup> Senators

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771. *Reauthorization of the Independent Counsel Statute, Part I: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 106th Cong. 27 (1999) [hereinafter 1999 House Subcommittee Hearings].

772. 1999 Senate Committee Hearings, *supra* note 433, at 242, 247–50 (statement of Attorney General Janet Reno).

773. *See id.* at 419 (testimony of Independent Counsel Kenneth W. Starr); Archibald Cox & Philip B. Heymann, *After the Counsel Law*, N.Y. TIMES, Mar. 10, 1999, at A19.



Howard Baker, Robert Dole, and George Mitchell,<sup>774</sup> as well as a bipartisan array of former Attorneys General<sup>775</sup> and independent counsels,<sup>776</sup> also called for restoring control over prosecution of senior government officials to the executive branch.

The Clinton Administration's opposition to reauthorization dealt a final death blow to the post-Watergate Ethics in Government Act. Republicans still upset about Lawrence Walsh's investigation of Iran-Contra joined with Democrats outraged by the Starr investigation of Clinton to bring an end to the regime of court-appointed independent counsels. The statute was allowed to lapse, and subsequent regulations gave the Attorney General the authority to appoint and supervise executive branch special counsels charged with investigating top government officials.

The abruptness with which support for the Act collapsed was somewhat shocking. At the end of 1997, the statute still enjoyed broad support, although many commentators and legislators believed some adjustments might be necessary. By the end of 1998, political support had almost completely evaporated.<sup>777</sup>

Thus, as we predicted in an article in 1997,<sup>778</sup> the rise and fall of the Ethics in Government Act was ultimately to parallel the rise and fall of the Tenure of Office Act of 1867 chronicled in our prior work.<sup>779</sup> Both statutes were enacted by imperial Congresses at a time of great presidential weakness: the Andrew Johnson Administration in one case and the post-Watergate Carter Administration in the other. Both statutes lasted roughly twenty years, during which time they worked ineffectively. Both statutes were then finally repealed in a show of bipartisan determination to return to the system of presidential removal power that the Framers so wisely bequeathed us.

774. See 1999 Senate Committee Hearings, *supra* note 433, at 26 (testimony of former Senate Majority Leader Howard H. Baker, Jr.); ROBERT DOLE & GEORGE J. MITCHELL, AM. ENTER. INST. AND THE BROOKINGS INST., PROJECT ON THE INDEP. COUNSEL STATUTE, REPORT AND RECOMMENDATIONS (May 1999).

775. See 1999 Senate Committee Hearings, *supra* note 433, at 28 (testimony of former Attorney General Griffin B. Bell); 1999 House Subcommittee Hearings, *supra* note 771, at 139 (testimony of former Attorney General William P. Barr); *id.* at 146 (testimony of former Attorney General Benjamin R. Civiletti).

776. See 1999 Senate Committee Hearings, *supra* note 433, at 56 (testimony of former Independent Counsel Joseph E. diGenova); *id.* at 204 (testimony of former Independent Counsel Robert Fiske); *id.* at 330 (testimony of former Independent Counsel Lawrence E. Walsh); *id.* at 364 (testimony of former Assistant Prosecutor, Whitewater Investigation Julie Rose O'Sullivan). Former independent counsels were not unanimous in their opposition. See *id.* at 64 (testimony of former Special Prosecutor Arthur H. Christy); *id.* at 76 (testimony of former Independent Counsel Hon. Curtis Emery Von Kann); *id.* at 283 (testimony of former Associate Independent Counsel John Q. Barrett).

777. See Gormley, *supra* note 18, at 101-03.

778. See Calabresi & Yoo, *supra* note 17, at 1462.

779. See Calabresi & Yoo, *supra* note 20, at 746-58, 760-63, 778-82, 791-95.

## XII. GEORGE W. BUSH

We complete our chronicle by offering a few observations about the presidency of George W. Bush. The full history of the current Administration has yet to be written. Given the importance of recent events to the historical narrative of the battle between the president and Congress for control over the administration of federal law, it seems appropriate to offer a brief discussion of some of the major events that have already occurred.

George W. Bush assumed the presidency under exceptionally trying circumstances after an election that was as chaotic and controversial as the Hayes-Tilden election of 1876. Bush entered the White House having lost the popular vote by a significant margin and having carried one essential state, Florida, by only a few hundred votes. To make matters worse, Bush's victory in Florida was confirmed in what was essentially a 5-4 decision of the Supreme Court.<sup>780</sup> One question many skeptics raised about Bush during his presidential campaign was whether he was a lightweight whose administration would in fact be run by others behind the scenes. If so, the unitary executive under Bush would have been unitary only in name.

David Frum, Bush's biographer and former speech-writer, reports that his very first impression of Bush was that he was thoroughly in control of his Administration. Frum reports that "[i]n that hour, Bush had settled one thing in my mind: I could never again take seriously the theory that somebody else was running this administration—not Cheney, not Rove, not Card."<sup>781</sup> Vice President Dick Cheney was often identified as the man running the Bush Administration behind the scenes because of his past work as Gerald Ford's White House Chief of Staff and as Defense Secretary during the first Gulf War under the first President Bush. However, Cheney's strength depended entirely on Bush's trust in him—and he earned that trust by subordinating himself entirely to Bush. David Frum noted:

Cheney was certainly a powerful figure within the Administration, but those who identified him as a shadowy shogun who secretly controlled Bush, the weak mikado, were wrong. Even on energy, the domestic issue Cheney cared about most, Bush made the ultimate decisions—and Cheney's views, though authoritative, were often overridden.<sup>782</sup>

Despite the political controversy that accompanied Bush's accession to the presidency, Bush emphatically endorsed the unitariness of the executive branch. His defense of the president's sole authority over the administration

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780. Bush v. Gore, 531 U.S. 98, 99 (2000).

781. DAVID FRUM, THE RIGHT MAN: THE SURPRISE PRESIDENCY OF GEORGE W. BUSH 29 (2003).

782. *Id.* at 62.

of the law was evident in his signing statements, in which he relied on unitary executive theory to continue the objections raised by previous Presidents to the legislative veto,<sup>783</sup> independent agencies,<sup>784</sup> the insulation inspectors general from presidential control,<sup>785</sup> and attempts to vest executive functions in the Comptroller General.<sup>786</sup> He also used his signing statements to oppose congressional attempts to limit OMB review of regulatory initiatives,<sup>787</sup> to control the resolution of interagency disputes,<sup>788</sup> to direct the actions of subordinate executive officers,<sup>789</sup> to limit the president's untrammelled power over prosecutions,<sup>790</sup> and other efforts to micromanage executive affairs.<sup>791</sup> Bush also invoked the unitary executive to

783. See Statement on Signing the Energy and Water Development Appropriation Act, 2002, 37 WEEKLY COMP. PRES. DOC. 1650 (Nov. 12, 2001).

784. See Statement on Signing the Vision 100-Century of Aviation Reauthorization Act, 39 WEEKLY COMP. PRES. DOC. 1795 (Dec. 12, 2003).

785. Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 40 WEEKLY COMP. PRES. DOC. 2673 (Nov. 1, 2004); Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, 39 WEEKLY COMP. PRES. DOC. 1549 (Nov. 6, 2003).

786. Statement on Signing the Help America Vote Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1888 (Oct. 29, 2002) ("Because this provision attempts to vest executive functions in the Comptroller General, it violates the constitutional principle of separation of powers."). On other occasions, the President construe statutory provisions purporting to vest executive authority in the Comptroller General as a directive to inform and confer with the Comptroller General in the interests of comity. See Statement on Signing the Ronald W. Reagan National Defense Authorization Act, *supra* note 785; Statement on Signing the Strengthen AmeriCorps Program Act, 39 WEEKLY COMP. PRES. DOC. 876 (July 3, 2003).

787. See Statement on Signing the Consolidated Appropriations Act, 2004, 40 WEEKLY COMP. PRES. DOC. 137 (Jan. 23, 2004); Statement on Signing the Consolidated Appropriations Resolution, 2003, 39 WEEKLY COMP. PRES. DOC. 225 (Feb. 20, 2003).

788. See Statement on Signing the Vision 100-Century of Aviation Reauthorization Act, *supra* note 784.

789. See Statement on Signing the Energy and Water Development Appropriation Act, 2004, 39 WEEKLY COMP. PRES. DOC. 1732 (Dec. 1, 2003); Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971 (Nov. 2, 2002); Statement on Signing the Foreign Authorization Act, Fiscal Year 2003, *in* 38 WEEKLY COMP. PRES. DOC. 1658 (Sept. 30, 2002); Statement on Signing the Enhanced Border Security and Visa Entry Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 822 (May 14, 2002).

790. See Statement on Signing the Intelligence Authorization Act for Fiscal Year 2004, 39 WEEKLY COMP. PRES. DOC. 1798 (Dec. 13, 2003); Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, *supra* note 789; Memorandum on the Congressional Subpoena for Executive Branch Documents, Memorandum for the Attorney General (Dec. 12, 2001), *in* 2001 PUB. PAPERS 1509, 1510 ("Congressional pressure on executive branch prosecutorial decisionmaking is inconsistent with separation of powers and threatens individual liberty.").

791. See Statement on Signing the Ronald W. Reagan National Defense Authorization Act, *supra* note 785 (rejecting restrictions on legal advice given by judge advocates general); Statement on Signing the Department of Defense Appropriations Act, 2005, 40 WEEKLY COMP. PRES. DOC. 1453 (Aug. 5, 2004) (rejecting limits on integration of foreign intelligence information); Statement on Signing the Consolidated Appropriations Act, 2004, *supra* note 787 (objecting limits on the detailing of executive branch personnel to Congress); Statement on

oppose congressional attempts to limit his exercise of the president's Commander-in-Chief and foreign affairs powers by placing limits on the manner certain troops could be used<sup>792</sup> or by attempting to direct the Administration to adopt certain foreign policy positions.<sup>793</sup> In addition, the President repeatedly insisted that congressional requests that executive agencies submit legislative proposals<sup>794</sup> or reports<sup>795</sup> did not interfere with

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Signing the Foreign Authorization Act, Fiscal Year 2003, *supra* note 789 (rejecting restrictions on the State Departments authority to protect correspondents working for Voice of America).

792. See Statement on Signing the Ronald W. Reagan National Defense Authorization Act, *supra* note 785; Statement on Signing the Intelligence Authorization Act for Fiscal Year 2004, *supra* note 790; Statement on Signing the National Defense Authorization Act for Fiscal Year 2004, 39 WEEKLY COMP. PRES. DOC. 1683 (Nov. 24, 2003).

793. Statement on Signing the Ronald W. Reagan National Defense Authorization Act, *supra* note 785; Statement on Signing the Vision 100-Century of Aviation Reauthorization Act, 39 WEEKLY COMP. PRES. DOC. 1795 (Dec. 12, 2003); Statement on Signing the Sudan Peace Act, 38 WEEKLY COMP. PRES. DOC. 1819 (Oct. 28, 2002); Statement on Signing the Foreign Authorization Act, Fiscal Year 2003, *supra* note 789; Statement on Signing the Export-Import Bank Reauthorization Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1014 (June 14, 2002); Statement on Signing the Enhanced Border Security and Visa Entry Reform Act of 2002, *supra* note 789.

794. See Statement on Signing the Ronald W. Reagan National Defense Authorization Act, *supra* note 785; Statement on Signing the Coast Guard and Maritime Transportation Act of 2004, 40 WEEKLY COMP. PRES. DOC. 1518 (Aug. 9, 2004); Statement on Signing the Federal Law Enforcement Pay and Benefits Parity Act of 2003, 39 WEEKLY COMP. PRES. DOC. 1836 (Dec. 19, 2003); Statement on Signing the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 39 WEEKLY COMP. PRES. DOC. 1774 (Dec. 8, 2003); Statement on Signing the 21st Century Nanotechnology Research and Development Act, 39 WEEKLY COMP. PRES. DOC. 1744 (Dec. 3, 2003); Statement on Signing the National Defense Authorization Act for Fiscal Year 2004, *supra* note 792; Statement on Signing the Animal Drug User Fee Act of 2003, 39 WEEKLY COMP. PRES. DOC. 1644 (Nov. 18, 2003); Statement on Signing the National Science Foundation Authorization Act of 2002, 38 WEEKLY COMP. PRES. DOC. 2178 (Dec. 19, 2002); Statement on Signing the Bob Stump National Defense Authorization Act for Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 2114 (Dec. 2, 2002); Statement on Signing the Intelligence Authorization Act for Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 2102 (Nov. 27, 2002); Statement on Signing the Maritime Transportation Security Act of 2002, 38 WEEKLY COMP. PRES. DOC. 2095 (Nov. 25, 2002); Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, *supra* note 789; Statement on Signing the Foreign Authorization Act, Fiscal Year 2003, *supra* note 789; Statement on Signing the National Defense Authorization Act for Fiscal Year 2002, 37 WEEKLY COMP. PRES. DOC. 1834 (Dec. 28, 2001).

795. See Statement on Signing the NASA Flexibility Act of 2004, 40 WEEKLY COMP. PRES. DOC. 278 (Feb. 24, 2004); Statement on Signing the Intelligence Authorization Act for Fiscal Year 2004, *supra* note 790; Statement on Signing the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, *supra* note 794; Statement on Signing the National Defense Authorization Act for Fiscal Year 2004, *supra* note 792; Letter to Congressional Leaders Certifying Actions Responsive to Ratification of the Joint Convention on Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 39 WEEKLY COMP. PRES. DOC. 692 (May 29, 2003); Statement on Signing the Consolidated Appropriations Resolution, 2003, *supra* note 787; Statement on Signing the E-Government Act of 2002, 38 WEEKLY COMP. PRES. DOC. 2174 (Dec. 17, 2002); Statement on Signing the Maritime Transportation Security Act of 2002, *supra* note 794; Statement on Signing the Homeland Security Act of 2002, 38 WEEKLY COMP. PRES. DOC. 2092 (Dec. 2, 2002); Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, *supra* note 789;

the president's ability to exert sole control over the affairs of the executive branch. Bush also routinely included clauses in his executive orders requiring that they be implemented in a manner consistent with "the President's constitutional authority to . . . supervise the unitary executive branch."<sup>796</sup> And his Administration staunchly protected the autonomy of the executive branch in the courts.<sup>797</sup>

Bush's control over his own Administration was vividly illustrated during the debate in 2001 over the federal government's policy on stem cell research. Some presidents might have taken a poll on the issue and then, having discovered that stem cell research was popular, allowed it. Polls did in fact show that "two-thirds of the public favored stem cell research" as did

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Statement on Signing the Small Business Paperwork Relief Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1112 (July 8, 2002); Statement on Signing the Export-Import Bank Reauthorization Act of 2002, *supra* note 793.

796. See Exec. Order No. 13,361, 40 WEEKLY COMP. PRES. DOC. 2831 (Nov. 22, 2004); Exec. Order No. 13,346, § 6(d), 40 WEEKLY COMP. PRES. DOC. 1218 (July 8, 2004); Exec. Order No. 13,345, § 5(a)(iv), 40 WEEKLY COMP. PRES. DOC. 1216 (July 8, 2004); Exec. Order No. 13,333, § 3(d), 40 WEEKLY COMP. PRES. DOC. 428 (Mar. 18, 2004); Exec. Order No. 13,313, § 3(c), 39 WEEKLY COMP. PRES. DOC. 1019 (July 31, 2003); Exec. Order No. 13,302, § 1(e), 39 WEEKLY COMP. PRES. DOC. 611 (May 15, 2003); Exec. Order No. 13,277, § 3(b)(i)(D), 38 WEEKLY COMP. PRES. DOC. 2059 (Nov. 19, 2002).

797. Consider, for example, *Cheney v. U.S. District Court for the District of Columbia*, a case concerning whether the Federal Advisory Committee Act could authorize discovery of the process by which the Vice President and other senior advisors gathered information to advise the President. The Administration's brief offered a detailed historical and constitutional basis for its arguments:

Article II, section 1 of the Constitution vests "the executive Power" in the President of the United States. In order to fulfill his executive duties, the President must be able to consult with his advisors and to obtain their candid guidance and expertise. Both the Opinion Clause and Recommendations Clause reflect this need and provide specific textual foundations for the President's powers to gather information and develop policy—and both clauses are manifestly not subject to manipulation or interference by Congress.

Brief for Petitioners at 28–29, *Cheney v. U.S. Dist. Ct.*, 124 S. Ct. 2576 (2004) (No. 03-475). The brief concludes this argument in sweeping fashion:

For the reasons set forth above, the Constitution, by its textual commitment of "executive Power" to the President and by the Opinion and Recommendations Clauses, has struck any balance there is to be struck—the Constitution preserves the zone of autonomy for the President in obtaining advice he seeks to perform his duties.

*Id.* at 34. By a vote of 7–2, the Supreme Court vacated the judgment of the D.C. Court of Appeals dismissing the Vice President's application for a writ of mandamus and his attempted interlocutory appeal. The Court found that the Court of Appeals failed to ask whether the district court's actions in entering discovery orders constituted an unwarranted impairment of another branch in the performance of its constitutional duties and that it evaluated the case under the mistaken assumption that the assertion of executive privilege was a necessary precondition to the Vice President's separation-of-powers objections. 124 S. Ct. 2576 (2004). The decision marked a major, albeit temporary, victory for the Administration's stance on executive privilege.

many major donors and prominent Republicans such as Nancy Reagan.<sup>798</sup> If "Bush were the puppet of his staff or his vice president that so many journalists still believed him to be, now was the moment for him to snap to. But he didn't."<sup>799</sup> Instead, he brooded and then reached as pro-life a position as he could under the circumstances. "Bush did not want to retreat. He held true to his principles. . . ."<sup>800</sup>

Bush's leadership ability was most dramatically on display after the terrorist attacks of September 11, 2001. Shortly after the attacks, Bush went to New York City to see the devastation of the World Trade Center buildings and, using "American vernacular, the plain language of the frontier," Bush pledged to "smoke out" the killers and 'git em' . . . 'dead or alive.'<sup>801</sup> Frum reports that from the moment of the attacks on, Bush was firmly in charge of the situation. "Within hours of the attack, he had made two crucial decisions that would determine the aims and conduct of the whole war [on] terror."<sup>802</sup> The first decision was to recognize that the War on Terror was a real war. The second was to hold not only the terrorists, but also those who had aided and harbored them, accountable for the destruction.

This latter decision came to be known as the Bush Doctrine, whereby the President said, "[w]e will make no distinction between those who planned these acts and those who harbor them."<sup>803</sup> Bob Woodward concluded that this "was an incredibly broad commitment to go after terrorists and those who sponsor and protect terrorists, rather than just a proposal for a targeted retaliatory strike. The decision was made without consulting Cheney, Powell or Rumsfeld."<sup>804</sup> Woodward additionally reported that Bush was adamant that he guide the war policy. When Cheney proposed that a war cabinet be composed that would devise "options" and then report to the President, Bush rejected the idea outright.

No, Bush said, I'm going to do that, run the meetings. This was a commander-in-chief function—it could not be delegated. He also wanted to send the signal that it was he who was calling the shots, that he had the team in the harness. He would chair the full National Security Council meetings . . . .<sup>805</sup>

It is particularly noteworthy that Bush did something that no president other than Ronald Reagan in dealing with Libya had done, and that was to "interpret a terrorist attack as an act of war, demanding a proportionately

798. FRUM, *supra* note 781, at 107.

799. *Id.*

800. *Id.* at 109.

801. *Id.* at 141.

802. *Id.*

803. BOB WOODWARD, BUSH AT WAR 30 (2002).

804. *Id.*

805. *Id.* at 38.

warlike response.”<sup>806</sup> By interpreting the September 11 attacks as an act of war and holding the Taliban accountable for their support of Osama Bin Laden, Bush showed he was fully in charge of his Administration.

One of Bush’s leadership traits is that “more than either of his immediate predecessors, he dared to discard obsolete ideas and habits and adapt himself to new times and new circumstances.”<sup>807</sup> Many people who dispute Bush’s intelligence claim he just gets good advice. David Frum responds that “Presidents are inundated by advice, and the very worst of it often sounds as beguiling and plausible as the very best. A president who consistently recognizes and heeds good advice will make good decisions. And about a president who consistently makes good decisions we can say: He’s smart enough.”<sup>808</sup> Far from being a lightweight swayed by the opinions of others, Bush is a heavyweight fully in control of his Administration who is sometimes plagued by the problem of being inarticulate.

Bush’s greatest domestic policy achievement was his passage of tax cuts,<sup>809</sup> but he also took other actions of major significance that were not widely noticed. One example is his decision not to repeal the Clinton-era executive orders providing hiring protection and spousal benefits for gay federal employees.<sup>810</sup>

Bush’s most important action for the unitary executive came during the development of the Department of Homeland Security: his insistence on unilateral presidential power to fire subordinate federal employees in that key department. This led to a major impasse between the Bush Administration and the Democratic Senate right before the 2002 midterm elections. Bush demanded that the Senate create his Homeland Security Department without the usual labor rules protecting the job security of department employees. Senate Democrats refused, and Bush, rather than caving, took the issue to the people in the 2002 midterm election and won. Republicans specifically won a Senate race against Max Cleland in Georgia on the very issue of Cleland refusing to vote for Bush’s Department of Homeland Security on Bush’s terms. This is significant because the fight over the Department of Homeland Security was in essence a fight over the removal power, and Bush fought that fight and won. This establishes that our most recent president is just as committed to the importance of the president’s removal power as were such past great presidents as Andrew Jackson, William Howard Taft, Franklin Roosevelt, and Ronald Reagan.

In addition to championing presidential removal power vis-à-vis the Department of Homeland Security, Bush also made two very high profile

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806. *Id.* at 143.

807. *Id.* at 91.

808. WOODWARD, *supra* note 803

809. FRUM, *supra* note 781, at 52.

810. *Id.* at 104.

removals that deserve note. After concluding that the economy was in recession and that his economic team needed revamping, Bush removed his Treasury Secretary Paul O'Neill and his chief White House economic adviser Larry Lindsey, and replaced them both with a new economic team. By showing this vigor in firing two officials whose policies did not seem to be working, Bush made it clear that he expected results from his subordinates in the executive branch, and that he would fire those who did not produce.

At the same time, Bush made one very high profile decision not to remove leaders of intelligence agencies in the immediate aftermath of the September 11 attacks. Many individuals thought that after those attacks FBI Director Robert Mueller and CIA Director George Tenet should be fired, but Bush retained them both. Frum's account is worth quoting at length:

After the Bay of Pigs fiasco, President Kennedy is supposed to have said to CIA director Allen Dulles, "If we lived under a parliamentary system, I'd have to resign. We don't so you have to." September 11 was a debacle that made the Bay of Pigs look like MacArthur's triumphant landing at Inchon, yet Bush insisted that both FBI director Robert Mueller and CIA director George Tenet stay at their posts. In the case of Mueller, Bush's forbearance was hard to gainsay: the FBI man had been sworn in only nine days before September 11. Keeping Tenet was a tougher call. Tenet had run the CIA for six years. If there was any obvious candidate to bear the blame for the 9/11 catastrophe, Tenet was the guy.

Yet Bush protected him. Why? The very toughest decisions a president makes are often the decisions to do nothing. When the country's blood is running hot, and the press is twitching, and the aides are panicking, it's tempting to quell the crisis with a bold audacious maneuver. In the very short run, these maneuvers often seem to work. The president is seen to be leading, and people are so impressed that they don't ask too many questions about where he is leading them.<sup>811</sup>

Bush was too strong a leader to be stampeded into firing George Tenet after September 11, when he thought Tenet was not to blame for the 9/11 fiasco. Tenet was ultimately removed in 2004 because of the CIA's mistaken intelligence about weapons of mass destruction in Iraq. The unitary executive is protected when presidents refuse public pressure to dismiss capable people, which is what George W. Bush did in this particular case.

There was only one major call for a special investigation of alleged executive wrongdoing in George W. Bush's administration. That fact is in itself an achievement, considering the Administrations of Jimmy Carter, Ronald Reagan, and Bill Clinton all had more ethics cases in their first four

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811. *Id.* at 190.



years than Bush did. In Bush's case, allegations were raised that White House Political Advisor Karl Rove had illegally disclosed the identity of a CIA agent, thus violating federal law. Attorney General John Ashcroft initially investigated this allegation and ultimately designated a special prosecutor, Patrick Fitzgerald, the United States Attorney in Chicago, Illinois, to investigate Rove.<sup>812</sup> This appointment was done in the fashion traditionally followed prior to the enactment of the EIGA, under which special prosecutors such as Archibald Cox and Leon Jaworski were picked, and was widely accepted as a good and fair way of justly investigating the allegations. It is noteworthy that this one investigation was well handled without the cumbersome and unconstitutional apparatus of the Ethics in Government Act. Had that Act been around, it is doubtful these allegations could have been investigated as justly and secretly as is now being done.

Bush and Attorney General Ashcroft took exceptionally vigorous measures to execute the law to protect the safety of Americans after September 11. "The Bush Justice Department detained more than 1000 people who might have relevant information about the terror attacks," and the Administration fought enthusiastically to exercise absolute control as to these detentions, irrespective of the citizenship or place of capture of the detainee.<sup>813</sup> Advancing an argument reminiscent of the vision of presidential authority asserted by Abraham Lincoln in 1861,<sup>814</sup> Theodore Roosevelt's Stewardship Theory,<sup>815</sup> and Harry Truman's justification for seizing the steel mills in 1952,<sup>816</sup> the Bush Administration maintained that it did not need a specific authorization from Congress in order to detain "enemy combatants," since Article II gave the executive plenary authority to detain.<sup>817</sup> Although the Supreme Court addressed the constitutionality of the Bush Administration's detention program in the landmark cases of *Hamdi v. Rumsfeld*<sup>818</sup> and *Rumsfeld v. Padilla*,<sup>819</sup> the Court was able to resolve both cases without having to address whether the Constitution gave the executive the authority to pursue its detention program in the absence of statutory authorization.<sup>820</sup>

Support for the unitariness of the executive branch does not necessarily require supporting the broad claims of inherent executive authority

812. See Dan Eggen & Mike Allen, *Ashcroft Recuses Self from Leak Case; U.S. Attorney to Oversee Probe*, WASH. POST, Dec. 31, 2003, at A1.

813. FRUM, *supra* note 781, at 167.

814. See Calabresi & Yoo, *supra* note 20, at 722–26 (discussing the strong executive actions President Lincoln took during the Civil War).

815. See Yoo et al., *supra* note 23, at 32, 35, 39.

816. See *supra* notes 127–43 and accompanying text.

817. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004).

818. *Id.*

819. 124 S. Ct. 2711 (2004).

820. See *id.* at 2715; *Hamdi*, 124 S. Ct. at 2639–40.

advanced by the Bush Administration. Even Justice Antonin Scalia, whose dissent in *Morrison v. Olson* remains one of the definitive statements in support of the unitary executive, took the view that citizens detained as enemy combatants must be either charged with treason or be released, absent a congressional act suspending the right to habeas corpus.<sup>821</sup> We agree with Justice Scalia on this point and think the Administration's doctrine of detaining citizens as enemy combatants takes the Lincolnian view of presidential emergency powers too far. As in the *Steel Seizure Case*, the Court was right in *Hamdi* to say that citizens cannot be deprived of life, liberty, or property without due process of law, even if the president has designated them to be enemy combatants in a war. As this Article has hopefully made clear, we generally reject such broad claims of presidential power to deprive people of life, liberty, or property in the absence of statutory authority, although we have some sympathy for the limited, implied protective power endorsed in *Cunningham v. Neagle*<sup>822</sup> and in *In re Debs*.<sup>823</sup>

The fact the Bush Administration has made such extraordinary claims of presidential power—claims that go way beyond a claim of control over the removal and law execution powers defended in this Article—shows that there has been no acquiescence in any diminution in presidential power during the Administration of George W. Bush. The fact that at times Bush may have pushed an overly vigorous view of presidential power that expanded far beyond the logical boundaries of the unitary executive implicitly confirms his determination to defend the prerogatives of the executive branch.

#### CONCLUSION

We thus come to the end of our survey of the presidents during the fourth half-century of American history, from Harry Truman to George W. Bush. We conclude that every president between 1945 and 2004 defended the unitariness of the executive branch with sufficient ardor to rebuff any claims that institutions such as independent counsels and independent agencies have been sanctioned as a matter of constitutional custom or history. The consistency with which presidents have asserted their sole power to execute the law is made all the more important by the Supreme Court's recognition in *INS v. Chadha*<sup>824</sup> that the fact that every president since Woodrow Wilson had objected to the legislative veto was sufficient to prevent the issue from becoming an established aspect of our constitutional order. Similar reasoning leads to a similar conclusion with respect to the removal power and the unitary executive.

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821. *Hamdi*, 124 S. Ct. at 2660–74 (Scalia, J., dissenting).

822. 135 U.S. 1 (1890).

823. 158 U.S. 564 (1895).

824. 462 U.S. 919, 942 n.13 (1983).

The most important controversy during the last half century of our history that bore on the unitary executive was the constitutionality of the special prosecutor regime set up by the Ethics in Government Act. The key point to appreciate about that controversy is that, notwithstanding the Supreme Court's approval of court-appointed independent counsels in *Morrison v. Olson*,<sup>825</sup> the Ethics in Government Act was allowed to lapse in June 1999 after both Democrats and Republicans grew to doubt its constitutionality and whether it represented good policy. This rejection of the Ethics in Government Act some twenty years after it was first enacted mirrors the repeal of the Tenure of Office Act under Grover Cleveland, which also occurred some twenty years after that statute was enacted. In both cases, Congress experimented with unconstitutional limits on the president's removal power, and in both cases the unconstitutional regime did not work. The stories of the rise and fall of both the Tenure of Office Act and the Ethics in Government Act are strikingly similar and stand as stark reminders of the dangers that can occur when the power to execute the law is placed outside of presidential control.

That the unitariness of the executive would reemerge as an open constitutional question in the years between 1945 and 2004 is all the more remarkable in light of the radical expansion of presidential power during the post-World War II era. The rise and fall of the Ethics in Government Act refutes the views of those who have argued that the modern Imperial Presidency needs to be reined in by the sanctioning of greater congressional meddling in the execution of the laws. The saga of the independent-counsel law, and most recently of the removal power and the Department of Homeland Security, suggest that we have not yet seen the last of the debates surrounding the unitary executive. It is our hope that this review of the history of presidential practices with respect to the execution of the law will help provide the historical context for discussing the relevant legal and normative issues.

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825. 487 U.S. 654 (1988).

